



Offig an Choimisinéara Faisnéise
Office of the Information Commissioner

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

Case Number: 170095

Applicant: Ms. Lois Kapila, Dublin Inquirer, 76-77 Old Kilmainham, Dublin 8

Public Body: Department of Education and Skills (the Department)

Issue: Whether the Department was justified in its decision to refuse access to fire safety reports in relation to certain schools under sections 29(1)(a), 30(1)(a), 30(1)(c) or 36(1)(b) of the FOI Act

Review: Conducted in accordance with section 22(2) of the FOI Act by the Information Commissioner

Decision: The Commissioner annulled the Department's decision and directed the release of the records to the applicant. He found that the Department had not justified its decision to refuse access to the records under sections 29, 30(1) or 36(1)(b) of the 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

On 16 December 2016, the applicant made an FOI request to the Department for a copy of any reports or findings that resulted from the fire safety audits of the following schools:

1. Scoil Naomh Lucais, Tyrrellstown, Dublin;
2. Belmayne Educate Together/St. Francis of Assisi, Dublin (adjoining campus);
3. Greystones Educate Together/Gaelscoil na gCloch Liath Dublin (adjoining campus);
4. Mullingar Educate Together, Westmeath.

On 17 January 2017, the Department refused the request on the basis of sections 29(1) and/or 30(1)(a) of the FOI Act. The applicant requested an internal review of this decision. On 15 February 2017, the Department affirmed its original decision. On 22 February 2017, the applicant applied to this Office for a review of the Department's decision.

Both the applicant and the Department made submissions in the course of the review. This Office also provided the company who constructed the schools, and who are the owners of two of the schools, with an opportunity to make submissions. In their submissions, the Department also sought to rely on section 30(1)(c) of the Act and the company sought to rely on section 36(1)(b) of the Act.

I have decided to conclude this review by way of a formal binding decision. In conducting this review, I have had regard to correspondence between the applicant and the Department, to correspondence between the Department and this Office, to correspondence between the applicant and this Office, to correspondence between the third party and this Office, to the contents of the records at issue and to the provisions of the FOI Act.

Scope of Review

The scope of this review is confined to whether the Department was justified in its decision to refuse access to the following records on the basis that they are exempt under sections 29(1)(a), 30(1)(a), 30(1)(c) or 36(1)(b) of the FOI Act:

1. Fire Safety Report, Powerstown Educate Together Tyrrellstown;
2. Fire Safety Report, Belmayne Educate Together;
3. Fire Safety Report, Belmayne St Francis of Assisi;
4. Fire Safety Report, Greystones Gaelscoil;
5. Fire Safety Report, Mullingar Educate Together.

Preliminary Matters

Section 13(4) of the FOI Act does not allow this review to have regard to any reasons as to why the applicant is seeking the withheld records (although such reasons may be relevant to consideration of the public interest).

Section 22(12)(b) of the FOI Act provides that, where a decision to refuse a request is being reviewed by the Information Commissioner, there is a presumption that the refusal is not justified unless the public body "shows to the satisfaction of the Commissioner that the decision was justified". Therefore, in this case, the onus is on the Department to justify its decision.

Analysis and Findings

Section 29 – Deliberations of Public Bodies

The Department argues that the records are exempt under section 29(1) of the Act. Section 29(1) provides that a head may refuse to grant an FOI request:

“(a) if the record concerned contains matter relating to the deliberative processes of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and
(b) the granting of the request would, in the opinion of the head, be contrary to the public interest,
and, without prejudice to the generality of paragraph (b), the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make.”

There are two requirements for section 29 to apply:

- the record must contain matter relating to the deliberative process, and
- disclosure must be contrary to the public interest.

These are two independent requirements and the fact that the first is met carries no presumption that the second is also met. Section 29(2) provides that the exemption contained in section 29(1) does not apply insofar as the records contain any of the following: (a) rules, procedures, guidelines etc. used or intended to be used, by an FOI body for the purpose of making decisions, determinations or recommendations; (b) factual information; (c) the reasons for the making of a decision by an FOI body; (d) a report of an investigation or analysis of the performance of an FOI body and (e) a report, study or analysis of a scientific or technical expert relating to the subject of his or her expertise or a report containing opinions or advice of such an expert and not being a report used or commissioned for the purposes of a decision of an FOI body made pursuant to any enactment or scheme.

The applicant argues that section 29(1) does not apply as the reports are those of a technical expert relating to the subject of his expertise.

The Department states that it is currently weighing up various options for completion of remedial works by the contractor. According to the Department, this deliberative process involves a number of viable options that may impact on the final resolution of issues raised in the fire safety reports. It states that it has been liaising over a number of months with the consultants, the project manager, the contractor and the fire officers to decide on a course of action.

The contractor submits that release of the reports would have the effect of reducing the goodwill between the parties and reducing the willingness of the parties to freely discuss and agree remedial works. It says that granting the request would have a very negative effect on future co-operation between the Department and building contractors and could result in an increase in costs. It argues that the company will come under "unwarranted and undue attention prior to completion of the deliberative process." The contractor takes the view that if

the expert reports were released now, they would give an unbalanced picture.

A deliberative process can be described as a thinking process that refers to the way an FOI body makes decisions. It involves the gathering of information from a variety of sources and weighing or considering carefully all of the information and facts obtained with a view to making a decision or reflecting upon the reasons for or against a particular choice. It seems to me that the records relate more to the Department's monitoring or supervisory role, rather than a deliberative process.

Even if I was satisfied that the records related to the Department's deliberative process, section 29(1) does not apply to a report of a technical expert relating to his/her area of expertise unless the report is used or commissioned for the purposes of a decision of the Department made pursuant to any enactment or scheme. The records were prepared by fire safety engineers and contain detailed technical information in relation to fire resistance, fire stopping measures, smoke seals, alarms etc. The Department accepts that the reports were created by a technical expert. It says that they were commissioned for the purposes of a decision of an FOI body. However, the Department does not identify any enactment or scheme pursuant to which such a decision was made. This is a requirement if the exclusion for such reports in Section 29(2)(e) is to apply. It is not in dispute that the purpose for which the reports were used or commissioned was to provide the Department with a survey/audit of fire safety in certain school buildings. I take it that the Department wanted to establish how the buildings as constructed complied with fire safety requirements and Fire Safety Certificates issued. I cannot see any case that the reports were "used or commissioned for the purposes of a decision of a public body made under any enactment or scheme." I consider that the type of "decision" envisaged by section 29(2)(e) is one which a public body is authorised to make on foot of a specific provision. I am not satisfied that the "decision" of the Department as to how to identify and act to resolve issues raised falls into the category of "decision" envisaged by section 29(2)(e).

I find that the reports fall under the category of records described in section 29(2)(e) and that, as a consequence, section 29(1) does not apply to them. In light of this finding, it is not necessary to consider whether release of the records is contrary to the public interest.

Section 30 - Functions and negotiations of FOI Bodies.

Section 30(1)(a) of the Act provides:

“A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of tests, examinations, investigations, inquiries or audits conducted by or on behalf of an FOI body or the procedures or methods employed for the conduct thereof”

The applicant argues that the Department has failed to show how release of the record could reasonably be expected to give rise to the harm envisaged.

The Department argues that premature release of the reports could prejudice its attempts to conclude the fire safety investigations in a timely and efficient manner by causing difficulty in its relationship with the contractor. It also says that ongoing negotiations on how to address fire safety issues could be harmed.

The contractor submits that release of the records would have a 'chilling effect' on future co-operation between the Department and building contractors when faced with any problems with building works to schools, and correction of same post completion date.

Where an FOI body relies on section 30(1)(a) it should:

- identify the potential harm in relation to the relevant function specified in paragraph (a) that might arise from disclosure, and
- having identified that harm, consider the reasonableness of any expectation that the harm will occur.

In examining the merits of an FOI body's view that the harm could be reasonably expected, I do not have to be satisfied that such an outcome will definitely occur. The test is not concerned with the question of probabilities or possibilities. It is concerned with whether or not the decision maker's expectation is reasonable. It is sufficient for the FOI body to show that it expects an outcome and that its expectations are justifiable in the sense that there are adequate grounds for the expectations.

According to the Department, release of these reports could prejudice attempts to conclude fire safety investigations. However, it seems to me that the fire safety investigations took place when the expert Fire Safety Engineers carried out detailed surveys and inspections of the schools to ascertain if the schools were constructed in accordance with the design proposed and the provisions of the fire safety certificates. I consider that these investigations concluded when the Engineers finalised their reports and provided these to the Department. I accept that after receiving the reports, follow up actions including discussions with various parties were necessary. I am not convinced that these discussions are "tests, examinations, investigations, inquiries or audits" under section 30(1)(a) and I find that these records are not exempt under section 30(1)(a) of the Act.

Section 30(1)(c) - Disclose positions taken for the purpose of Negotiations

The Department and the contractor have argued that release of the reports would damage ongoing negotiations; therefore, section 30(1)(c) is relevant. Section 30(1)(c) provides:

"A head may refuse to grant an FOI request if access to the record concerned could, in the opinion of the head, reasonably be expected to disclose positions taken, or to be taken, or plans procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be carried on by or on behalf of the Government or an FOI Body"

As described above, the records contain detailed technical information in relation to fire safety issues. I am not satisfied that release of this type of information would disclose positions taken for the purposes of negotiations. I find therefore that the records are not exempt under section 30(1)(c).

Sections 30(1)(a) and 30(1)(c) are subject to a public interest balancing test. However, before I consider the public interest I will address a submission made by the contractor in relation to the potential economic effect that release of the records could have on its business.

Section 36 - Commercially Sensitive Information

According to the contractor, release of the records prior to the conclusion of the process undertaken by the Department could have “a significant economic effect” on the company due to adverse publicity. I take this as an argument that the records are exempt under section 36(1)(b) of the Act. Section 36(1)(b) provides:

“A head shall refuse to grant an FOI request if the record concerned contains ...information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates...”

The fire safety reports were created between May and July 2016. According to the Department, initial remedial works have already been carried out by the contractor and it anticipates completion of negotiations and remedial works by September 2017. It appears, therefore, that many of the issues identified in the reports have already been rectified or will be rectified by September 2017. In these circumstances, I am not satisfied that release of the reports could reasonably be expected to result in a material financial loss to the contractor due to adverse publicity. However, even if I was so satisfied, section 36(1) is also subject to a public interest balancing test. I consider the public interest below.

The Public Interest

The applicant argues that there is a public interest in release of records which relate to the safety of public buildings such as schools. She also takes the view that release of the records is in the public interest since public funds were used to build the schools.

According to the Department, premature release of the records would prejudice its attempts to conclude the fire safety investigations in a timely manner, which would not be in the public interest.

The contractor argues that the effect of releasing the records would be to lessen co-operation between the parties in coming to an agreement, leading to greatly increased costs for the Department and the State, which would not be in the public interest.

There is a public interest in the Department and other agencies ensuring that monitoring and oversight of school building projects is carried out effectively and efficiently. There is also a public interest in companies being able to conduct commercial transactions with public bodies without fear of suffering commercially as a result.

On the other hand, there is a public interest in government being open and accountable as regards oversight of public projects and in openness and accountability in the use of public funds.

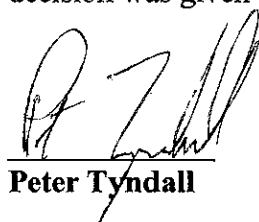
As outlined above, I am not satisfied that release of these reports could reasonably be expected to result in prejudice to investigations or negotiations conducted by the Department or in a material financial loss to the contractor. However, even if I was satisfied that these harms could reasonably be expected, it seems to me that, at this point in time, the public interest in government being open and accountable outweighs the public interest in preventing the harms envisaged by the Department and the contractor. I find that the public interest would, on balance, be better served by the release of the records.

Decision

Having carried out a review under section 22(2) of the Freedom of Information Act 2014, I annul the decision of the Department. I find that the Department has not justified its decision to refuse access to the records requested having regard to the requirements of section 29(1)(a), 30(1)(a), 30(1)(c) or 36(1)(b) of the Act. I direct that the Department release the records to the applicant.

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.



Peter Tyndall

Information Commissioner

10 August 2017