

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 21 May 2024

Public Authority: Northern Ireland Public Services Ombudsman
Address: Progressive House
33 Wellington Place
Belfast
BT1 6HN

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint they had submitted Northern Ireland Public Services Ombudsman (NIPSO) in respect of alleged maladministration.
2. The Commissioner's decision is that, on the balance of probabilities, NIPSO does not hold any further information within scope of the request.
3. The Commissioner does not require further steps.

Request and response

4. On 25 July 2023, the complainant wrote to NIPSO and requested information under the Environmental Information Regulations (EIR) in the following terms:
 - "All written communication (and written records of verbal communications) between NIPSO and the NIHE between 30/5/23 and the date on this letter.
 - All written reports/assessments prepared by NIPSO that relate to the complaints made by [redacted] against the NIHE.

- All NIPSO internal communications that relate to the complaints made by [redacted] against the NIHE.”
5. NIPSO responded on 7 August 2023 and stated that it considered the appropriate access regime was FOIA. However, it responded primarily in the context of EIR and made references to the equivalent sections of FOIA. NIPSO also referred to other legislation it considered may be relevant.
 6. NIPSO refused to provide the requested information citing regulation 12(5)(a) EIR – national security/public safety and section 44 FOIA – prohibitions on disclosure. It appears that NIPSO intended to cite regulation 12(5)(d) EIR – confidentiality of proceedings, rather than 12(5)(a).
 7. On 26 September 2023, NIPSO provided an internal review and maintained that the information was exempt from disclosure by virtue of regulation 12(5)(d). It also explained that if the request was dealt with under FOIA it would also be exempt under section 44.
 8. The Commissioner wrote to NIPSO asking it to reconsider its position. NIPSO then wrote to the complainant and explained that having reviewed the information held there are only a small number documents which may fall within scope of the request.
 9. NIPSO offered the complainant the opportunity to visit its office and review those documents. If any specific documents were identified which the complainant considered were necessary to be disclosed, then NIPSO would make a fresh consideration in regard to that document/s. In the event that it was determined it was exempt then that decision would be reviewed by a senior member of the management team before issuing a decision. A right of ‘internal review’ would remain and would be undertaken by the Deputy Ombudsman.
 10. The complainant was initially reluctant to accept NIPSO’s offer. However, the Commissioner explained that when undertaking an investigation he is reliant on a public authority providing him with any withheld information, along with any relevant explanations. It was the Commissioner’s view that this would be the same information NIPSO was offering to show them.
 11. The complainant accepted the meeting and attended the office on two occasions to view the information in person. However, the information available did not include correspondence that the complainant had expected to be there, that is, a copy of any communication with the NIHE officer allocated to investigating their original complaint.

Scope of the case

12. The complainant initially contacted the Commissioner on 1 November 2023 to complain about the way their request for information had been handled. They provided the Commissioner with detailed information about the background to the complaint, however, for brevity it is not repeated here.
13. In short, the complainant raised concerns with Northern Ireland Housing Executive (NIHE) about the disposal of land for development. Having completed the NIHE complaint process the complainant referred the matter to NIPSO as they considered NIHE had:
 - provided misleading information,
 - did not respond to them in a timely manner,
 - failed to follow proper procedures
 - withheld some information,
 - created unnecessary delay, and
 - had concerns about the procurement process.
14. In correspondence provided to the Commissioner, the complainant referred to communications they had received from the NIHE officer that indicated they had been in contact with NIPSO about the case.
15. The Commissioner considers the scope of his investigation is to determine if NIPSO has made all the information it holds available to the complainant.
16. After a review of the initial complaint, NIPSO wrote to the complainant on 20 December 2022 confirming it was not within its remit to consider complaints relating to matters of general concern. It referenced section 5(1) of the Ombudsman's legislation which refers to "a member of the public who claims to have sustained an injustice".

Reasons for decision

Regulation 5(1)

17. Regulation 5(1) of EIR states that a public authority that holds environmental information must make it available on request if it isn't exempt from disclosure. Regulation 5(1) is the equivalent of section 1 of FOIA.

Section 1 – general right of access

18. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
19. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner - following the lead of a number of First-tier Tribunal decisions - applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
20. Following the Commissioner's enquiries to NIPSO it explained it has a three stage investigation process for complaints and it will consider whether it falls under its jurisdiction.
21. It explained each stage, and that the first stage of 'Assessment' (previously Initial Assessment) involves considering whether or not it has the legal authority to investigate a case. It assesses the complaint in the context of the legislation in 'deciding whether the case is within jurisdiction'. It relies on and refers to the relevant provisions in the legislation to explain its decision where it decides that it does not have the legal authority to investigate a complaint. No substantive enquiries are made of a public body at this stage.
22. The next stage is 'Investigation' (previously Assessment) and finally 'Further Investigation' (previously Investigation).
23. Investigation is the process by which it determines whether it should investigate a complaint further. It involves considering the complaint and the supporting evidence being presented.
24. Further Investigation is the final stage of the case handling process. The purpose of an investigation is to establish if the allegations made in the complaint can be substantiated and, if so, whether they disclose any maladministration by the organisation complained of. The outcomes to the investigations are produced in a report or a report letter which the complainant and the relevant public body are sent a copy of.
25. NIPSO explained the complaint was closed at the first stage of the process because the investigative team found that it had no jurisdiction to consider the matter. The complainant was provided the opportunity to seek a review of that decision. The review found that the complaint was not within the legal jurisdiction of NIPSO to consider. The complainant

was then made aware of their rights to seek a judicial review of the decision.

26. It went on to explain that the consequence of NIPSO having no jurisdiction to investigate is that, other than to be advised of the existence of a complaint and that it had been closed, NIHE was not requested to provide any information and therefore the information held on file is limited to what was provided by the complainant and NIPSOs notes.
27. In its submissions to the Commissioner NIPSO explained that when it received the original information request it undertook the following actions to identify all relevant documents:
 - A review of the specific case in the case handling system including all documents and notes (screenshots have been attached for reference)
 - Searches of other drives, though no documentation was identified as all documentation should be held within the 'WorkPro' records management system
 - Emails were not searched as NIPSO has an automated process to delete emails after 3 months and the request was received 7 months after the complaint was closed.
 - A follow-up with staff involved in the case to determine any additional documentation that may have been held outside of NIPSO systems including any manual information or information on individual drives
 - Review of any disposed records to determine that no documentation relating to this case was disposed.
 - NIPSO also stated that it does not hold manual records and its retention and disposal policy requires that documentation is held on file for 3 years following the last activity on a case.
28. It provided the Commissioner with a series of screenshots of the records management system, which captures a list of all the information which NIPSO holds in this matter.
29. Although the complainant may have expected some record of contact NIPSO had with NIHE, it is not within the remit of the Commissioner to determine what information a public authority should hold, and can only determine if it has complied with the legislation.

Having reviewed the information provided, the Commissioner is satisfied that on the balance of probabilities NIPSO does not hold any further recorded information falling within the scope of the complainant's request.

Right of appeal

30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Duffy
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Information Commissioner's Office
Wycliffe House
Water Lane
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