



NCN: [2023] UKFTT 900 (GRC)
Case Reference: EA-2023-0218

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP
Heard on: 2 October 2023
Decision given on: 26 October 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER PHEBE MANN

Between

POLICE OMBUDSMAN FOR NORTHERN IRELAND

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) MARK RAINEY

Respondents

Representation:

For the Appellant: Mr McKay (Counsel)

For the First Respondent: Ms Fitzpatrick (Counsel)

For the Second Respondent: In person

Decision:

- 1) The appeal is allowed in part.
- 2) The Police Ombudsman for Northern Ireland ('the Ombudsman') was entitled to rely on section 44 of the Freedom of Information Act 2000 (FOIA) in relation to the part of the withheld information identified in the closed annex.
- 3) Part of the withheld information, identified in the closed annex, falls outside the scope of the request.

- 4) The Ombudsman was not entitled to rely on section 44 in relation to the rest of the withheld information ('the remaining information').
- 5) The tribunal will determine whether or not to issue a substitute decision notice, and in what terms, when it has reached a decision in relation to the application of section 30 FOIA to the remaining information.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-126944-V7J6 of 28 March 2023 which held that the Police Ombudsman for Northern Ireland (PONI) ('the Ombudsman') was not entitled to rely on section 44(1)(a) of the Freedom of Information Act 2000 (FOIA) to withhold the requested information. The Commissioner required the public authority to disclose the requested information and issue an appropriate refusal notice if it wished to withhold any personal data.
2. At the hearing the tribunal gave the Ombudsman permission to rely on further exemptions: section 30 and section 42. The tribunal has concluded that the document said to be covered by legal professional privilege is exempt under section 44. Section 30 is therefore the only outstanding exemption. The tribunal has issued separate case management directions in relation to the determination of the issues under section 30.
3. This decision contains a closed annex. It is necessary to withhold the closed annex from the second respondent because to do otherwise would defeat the purpose of the proceedings. It is likely that a redacted version of the annex will be able to be released once the proceedings, including any appeal, have concluded. The tribunal will seek comments from the appellant and the first respondent before releasing any version of the closed annex.
4. The decision also contains an open annex.

Statutory and factual background to the appeal

5. The Ombudsman is the body responsible for investigating complaints about the police in Northern Ireland. The Ombudsman's powers, in so far as relevant to this appeal, are set out in Part VII the Police (Northern Ireland) Act 1998 (the Police Act 1998).
6. The statutory regime governing the Ombudsman's powers was helpfully summarised by Scofield J in his determination of the application for leave to apply for judicial review in **Re R216's Application for Judicial Review** [2022] NIKB 28 and we have reproduced that in an annex to this decision.

7. Section 62 of the Police Act 1998 provides:

“The Ombudsman may, in relation to any exercise of [her] functions under this Part, publish a statement as to [her] actions, [her] decisions and determinations and the reasons for [her] decisions and determinations.”

8. Section 51(4) of the Police Act 1998 provides:

“The Ombudsman shall exercise [her] powers under this Part in such manner and to such extent as appears to [her] to be best calculated to secure –

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and of members of the police force in that system.”

9. Section 63 of the Police (Northern Ireland) Act 1998 (the Police Act 1998) provides:

“(1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies.”

10. Section 73(1) of the Police Act 1998 provides that any word or expression defined in the Police (Northern Ireland) Act 2000 (the Police Act 2000) shall have the same meaning in the Police Act 1998. Section 77(1) of the Police Act 2000 provides that “functions” includes powers and duties.

11. On 9 June 2016 the current Ombudsman’s predecessor, Dr Michael Maguire, published a public statement in accordance with section 62 of the Police Act entitled ‘Relating to a complaint by the victims and survivors of the murders at the Heights Bar in Loughinisland, 18 June 1994’. This public statement was the subject of a legal challenge, the outcome of which was the Court of Appeal decision in **Re: Hawthorne and another’s Application** [2020] NICA 33.

12. In 2017 a documentary about the Loughinisland murders called ‘No Stone Unturned’ was released (‘the Documentary’). It contained an interview with the then Ombudsman, Dr Maguire.

13. On 4 October 2017, the day after the Ombudsman had a viewing of the documentary, the Ombudsman briefed the Police Service of Northern Ireland (PSNI) that it had identified a number of individuals who might be at risk, and that it had been shown extracts from what appeared to be a Police Ombudsman document. PSNI commissioned Durham Police to investigate the means by which

the film's production team secured access to the material, whether by theft or other unauthorised disclosure.

Requests, Decision Notice and appeal

The Request

14. This appeal concerns the following request made by Mark Rainey on 3 June 2021:

"I request a copy of all correspondence between anyone acting on behalf of PONI and anyone representing the makers of No Stone Unturned."

15. This was a follow up to a request made on 4 February 2021, to which the Ombudsman replied as follows (reply in bold) on 23 March 2021:

"Can you please provide the following information relating to the Police Ombudsman's involvement with the makers of the film No Stone Unturned.

1. What date did Dr Maguire receive the initial request inviting him to cooperate with the film-makers or their representatives?

We do not hold this information.

2. What date did Dr Maguire first correspond with the film-makers?

We do not hold this information.

3. Can you please provide a copy of any correspondence/e-mails sent to the film-makers by the Ombudsman that relate to his potential contribution, either to the research behind the production or on camera?

We do not hold this information.

4. What steps did PONI take to establish how the confidential material used by the film-makers found its way into the hands of unauthorised persons?

On 4 October 2017, the day after we had a viewing of the documentary, the Police Ombudsman's Office briefed PSNI that it had identified a number of individuals, who may now be at risk, and that it had been shown extracts from what appeared to be a Police Ombudsman document, albeit in different format to a Police Ombudsman document. PSNI commissioned Durham Police to investigate the means by which the film's production team secured access to the material, whether by theft or other unauthorised disclosure.

5. If steps were taken to establish how this happened, on what date did those enquiries begin?

This is a matter which should be addressed to the PSNI/Durham Constabulary."

16. Mr Rainey emailed the Ombudsman on 24 March 2021 and their reply was as follows (reply in bold):

"1- Has PONI asked Dr Maguire if he holds the requested information and, if he does, has a copy been requested? We did contact Dr Maguire who advised that he does not hold this information.

2- What searches have been undertaken to establish whether a record of the requested correspondence exists? We undertook searches of email addresses and our electronic document record system.

3-Are there any indications that a record did exist but has since been deleted?

Having received your request of 24 March 2021, we undertook additional searches. These confirmed that the Police Ombudsman's Office does not hold any correspondence between the former Police Ombudsman which relate to his potential contribution, either to the research behind the production or on camera.

However, there is correspondence between the Office's former Director of Information and the filmmakers which relate to the documentary."

17. In relation to that correspondence, the Ombudsman stated that it was exempt information under section 44(1)(a) FOIA. Mr Rainey asked for an internal review by email dated 3 June 2021. That email also included the request in issue in this appeal.

The Response

18. The response to the request of 3 June 2021 is dated 24 August 2021. It is contained in the same document as the internal review relating to the previous requests. The Ombudsman refused to disclose the requested information under section 44(1)(a) FOIA relying on 63 of the Police Act 1998.

19. Mr Rainey referred the matter to the Commissioner on 1 September 2021. The Commissioner did not consider it necessary to ask the Ombudsman to conduct an internal review in relation to this request.

The Decision Notice

20. In a decision notice dated 28 March 2023 the Commissioner decided that the information held was not exempt information under section 44(1)(a).

21. The Commissioner decided that section 51(4) of the Police Act was not relevant to the determination of the case. because it did not describe a specific function or power but rather the manner in which the Ombudsman should exercise the powers entrusted to her under Part VII of the Act.
22. The Commissioner held that section 62 of the Police Act did set out a specific function or power (i.e. to make a public statement in relation to the exercise of the Ombudsman's functions) and that information received by the Ombudsman in connection with that power could be caught by the statutory prohibition on disclosure under section 63.
23. The Commissioner also recognised that information generated by the Ombudsman might in some cases include or be drawn from information received by the Ombudsman. The correct interpretation of section 63 did not extend to information "purely" generated by the Ombudsman.
24. He determined that the exemption in section 44(1)(a) of FOIA could be engaged in respect of the part of the disputed information received in correspondence by the Ombudsman, but only to the extent that it had a connection with the exercise of the Ombudsman's functions.
25. The Commissioner decided that liaising with the media was not in itself one of the Ombudsman's specific functions under the Police Act.
26. The Commissioner determined that none of the disputed information related to the Ombudsman's investigation in 2016 or its issuing of the 2016 Report thereafter.
27. The Commissioner decided that a large proportion of the disputed information was administrative and anodyne and did not contain any reference to the public statement. Although the disputed information contained some information referring to the Documentary, there was insufficient connection between that information and the exercise of the Ombudsman's functions.
28. Given that some of the disputed information was third-party personal data, the Commissioner stated that it was appropriate for the Ombudsman to issue a refusal notice under section 40(2) to Mr Rainey in respect of that information where its disclosure would contravene any data protection principles or the right to object.

Notice of Appeal

29. The grounds of appeal are:

Ground 1

30. The Commissioner failed to understand the intrinsic relationship between section 51(4) of the Police (Northern Ireland) Act 1998 and section 63 and the unique context of policing in Northern Ireland.

Ground 2

31. The Commissioner failed:

(a) to give any or any sufficient weight to the fact that the 1998 Act is a penal statute (a contravention of section 63 is an offence) and should therefore be presumptively strictly applied.

(b) to apply section 63 strictly.

Ground 3

32. The decision on “information received” is inconsistent with the strict approach to disclosure required under section 63 in that it would require the Ombudsman to engage in distinguishing between:

(a) information received and generated;

(b) where information is generated, whether this includes or is drawn from information received;

(c) where the information generated is derived from a document, that this information is caught by the statutory prohibition, but other information may not be.

Ground 4

33. The decision on “functions” is inconsistent with a strict approach to section 63 of the 1998 Act, in particular, when considered alongside section 51(4) (as the Ombudsman contends it should have been) and having regard to the jurisdictional context of policing in Northern Ireland. Specifically:

(a) The Commissioner was wrong, having regard to the interests the Ombudsman must serve under section 51(4), that engaging with the media is not part of her statutory functions;

(b) The Commissioner failed to recognise the distinction between the Ombudsman’s role in serving the interests under section 51(4) and that of “most if not all public authorities and other organisations” who are not under an equivalent duty;

(c) The Commissioner was wrong to recognise on the one hand that all information received in connection with the Ombudsman’s functions is caught by the prohibition but then to conclude that where information received “is administrative and anodyne and does not contain any reference to the public statement” it is not.

Ground 5

34. The Commissioner, having recognised that other exemptions could be relied on by the Ombudsman, failed to consider these. To direct disclosure in circumstances where the Commissioner knew, or ought to have known, that disclosure would be inconsistent with other exemptions available to the Ombudsman, is contrary to the Commissioner's general functions under section 47 FOIA.

Responses and submissions

The Commissioner's response

The definition of a statutory function

35. The Commissioner submits that there is a distinction between a public authority's express statutory "functions", on the one hand, and other powers given under statute which are ancillary or incidental to those functions but are not a part of those functions: (**Hazell v Hammersmith and Fulham London Borough Council** [1992] 2 AC 1 at 29E).

Ground 1 – intrinsic relationship between sections 51(1) and 63

36. The Commissioner submits that the Ombudsman has not made clear what she considers to be the "intrinsic relationship" between sections 51(1) and 63 of the Police Act and nor has she explained what exactly is being asserted as to the relevance of the unique context of policing in Northern Ireland. For section 44(1)(a) to be engaged, a relevant statutory bar to disclosure must both exist and apply on the facts.

Ground 2(a) and (b) and 3 – strict interpretation of section 63

37. Insofar as the Ombudsman contends that the word 'received' should be read as encompassing both received information and purely generated information, it is submitted that she is contending for a broader, less precise and more uncertain interpretation, rather than a stricter interpretation of section 63(1).

Grounds 4– inconsistency of decision on 'functions' with a strict approach

38. The Commissioner adopted the stricter approach to interpretation. There is no confusion in relation to the finding on 'administrative and anodyne' information. The Commissioner held that that was not received in connection with any of the Ombudsman's functions.

Ground 5 – failure to consider other exemptions

39. The Commissioner submits that it was/is for the Ombudsman to identify which exemptions upon which it wishes to rely. It is possible for the Ombudsman to seek now to rely on any different/additional exemption(s), subject to the tribunal's case management powers under Rule 5 of the FTT Rules.

Response of Mr Rainey

40. Mr Rainey's response is as follows:

"I believe the Office of the Police Ombudsman (PONI) strayed well beyond its statutory remit in its dealings with the makers of the film *No Stone Unturned*. The release of the correspondence will help clarify whether PONI took any steps to establish how highly confidential intelligence material found its way into the hands of the film-makers.

If there is a record of such questions being posed, this would help alleviate concerns that the document was deliberately leaked.

It is clear from the material in the public domain, much of it generated by members of the film's production team, that key elements of the Loughinisland story were based on several misconceptions placing it at odds with the information contained in the PONI report.

For example, a comprehensive commemorative booklet produced to mark the 18th anniversary of the murders (June 2012) all but names the getaway driver as a suspected police agent who was later granted a Royal Prerogative of Mercy.

In 2013/2014 I carried out research and arranged a number of interviews for the film's production team all based on the misconception that this suspected agent was a central figure in the murders.

The leaking/theft of the intelligence file corrected what would have been a false narrative and ensured that the film supported the findings of the PONI investigation.

It is therefore, I believe, in the public interest that all correspondence between PONI and the film-makers is available for scrutiny."

Reply of the Ombudsman

Functions and powers

41. The Ombudsman submits that the case law relied on by the Commissioner is not of assistance in this appeal.

Ground 1

42. The Ombudsman's position is that the exercise of the power in section 62 is linked to the essential nature of s51(4): her power must be exercised in a way that achieves those two objectives. The Court of Appeal of Northern Ireland considered that the requirement imposed by section 51(4) was "a significant material consideration in deciding to issue a [Public Statement under section 62]: **Re: Hawthorne and another's Application** [2020] NICA 33, at 42.

Grounds 2 and 3

43. It is submitted that 'strict' in this context does not mean literal but strictly avoiding an interpretation that would impose a penalty in the face of ambiguity. This is the established interpretative rule.

44. The Commissioner accepts that 'received' for the purposes of section 63 of the 1998 Act includes material not just received but also that generated from received. The Ombudsman submits that this is to accept that the term 'received' is capable of more than one meaning. The Ombudsman's interpretation is reasonable and avoids the risk of penalty. Once the interpretative rule arises it must be applied in favour of the person relying on it.

Ground 4

45. The Ombudsman clarifies that it is not her case that section 51(4) of the 1998 Act sets out the Ombudsman's functions. In achieving the objectives under section 51(4), in particular the confidence of the public, engagement with the media is an essential element when it is, as it was in the present circumstances, inexorably linked to the exercise of her functions under section 62.

Ground 5

46. The Ombudsman sought in its reply to rely in the alternative on section 30 and section 31. Mr McKay confirmed in the hearing that the Ombudsman no longer seeks to rely on section 31.

Evidence

47. We have read and taken account of an open and a closed bundle of documents.

48. It is necessary that the documents in the closed bundle are not revealed to Mr Rainey because to do otherwise would defeat the purpose of the proceedings. The tribunal accepts that in accordance with the guidance given by the Court of Appeal in **Browning** we are required to disclose as much as possible about the closed bundle when writing our decision.

49. In accordance with the guidance in **Browning**, the tribunal records that the closed bundle contains the withheld information, which consists of correspondence between the Ombudsman's office and the makers of the Documentary.

50. We held a closed session. This is the agreed gist that was given to Mr Rainey:

"The general nature of the material was discussed. The appellant indicated to the tribunal that it would need to make a determination as to whether the material related to the exercise of relevant powers and functions. The appellant submitted the material did relate to the exercise of those functions and the respondent made submissions consistent with the decision notice that there was no appropriate connection with the section 62 function.

Three specific documents were considered.

One identified the aim of the correspondence, from the appellant's point of view, in engaging with the filmmaker. Another related to an administrative matter and arranging a meeting. The respondent also referred to a third item of correspondence which appeared to the Commissioner to support his interpretation of the nature of the information."

51. The Judge explained to Mr Rainey in the hearing that during the closed session Mr Mackay had clarified the Ombudsman's position on the meaning of 'received'. Mr McKay submitted that the question under section 63 was: 'Would the material exist but for information received by the Ombudsman, and does it relate to the powers and functions of the Ombudsman?'

Legal framework

S 44 - Disclosure prohibited by statute

52. Section 44(1)(a) provides that information is exempt information if its disclosure is prohibited by or under any enactment. It is an absolute exemption so the public interest balance does not apply.

Statutory interpretation

53. It is helpful to set out the general principles of statutory construction as the tribunal understands them. We have drawn these principles from paragraphs 29-31 of **R (on the application of O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department (Respondent)** [2022] UKSC 3 and from *Bennion, Bailey and Norbury on Statutory Interpretation*.

54. The legal meaning of an enactment is the meaning that conveys the intention to be attributed to the legislature by reference to the meaning of the words and the context in which they are used. The text of a provision, as it would be reasonably

understood, is the starting point, but the text should be read in the context of the Act as a whole and in its legal, social and historical context.

55. The primary source of context should be other provisions of the statute or the statute as a whole. Other sources play a secondary role but may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty.
56. The legislature is taken to be rational, reasonable and informed and to be pursuing a clear purpose in a coherent and principled manner. The meaning of a provision includes what is expressed and what may properly be implied.
57. If opposing constructions are contended for, when considering which of the opposing constructions of the enactment corresponds to its legal meaning, the tribunal should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally.
58. If doubt arises, rules of construction can be relied on to assist in identifying the intention of the legislature. In this appeal the principles that appear to be at least potentially relevant include certainty, legislative purpose, avoiding an unworkable result and the presumption against doubtful penalisation.

The role of the tribunal

59. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Issues

60. The issues for the tribunal to determine are:
 - 60.1. Was disclosure of the information prohibited under section 63 of the Police Act:
 - 60.1.1. Was the information 'received' by the Ombudsman?
 - 60.1.2. Was it received 'in connection with' any of the Ombudsman's functions?

Submissions

Open oral Submissions from Mr McKay for the Ombudsman

61. Mr McKay indicated that the Ombudsman wished to rely in addition on section 42 FOIA in relation to document 8 in the closed bundle. He indicated that section 31 was no longer relied upon, but the Ombudsman still wished to rely on section 30 FOIA.
62. Mr McKay submitted that the power relied on is the power to issue a public statement under section 62. Section 51(4) is closely related to section 62 (see **Re Hawthorne**). It carves out the contours on what a public statement can and cannot say. Maintaining public confidence is a significant material consideration and there is an intrinsic connection between sections 51(4), 62 and 63.
63. Mr McKay argued that the primary purpose of the Ombudsman's engagement with the film makers was to protect the integrity of the public statement in issue. A failure to engage with the film makers could result in inaccurate reporting of the Ombudsman's findings which would be inconsistent with the Ombudsman's mandate in section 51(4). Section 51(4) is a mandatory provision and it is for the Ombudsman to decide the manner in which she exercises her powers to secure the confidence of the two opposing groups of the public in a divisive environment.
64. It was submitted that engagement with the media before or immediately after a public statement is issued is the exercise of a function having regard to the parameters of section 51(4). However the purpose of the engagement in question is more clearly articulated in the closed bundle which stated that the purpose was to ensure accurate reporting of the public statement.
65. The Ombudsman argues that section 63 is drafted in the way it is because any disclosure that takes place outside the prohibition runs the risk of either revealing the identity of persons who could be targeted by terrorists or the 'jigsawing' of different strands of information to achieve that purpose. Sophisticated terrorists will use every detail to build a picture to achieve their objectives. Preventing that is the statutory purpose of section 63. That is why the Ombudsman says that section 63 has to be carefully construed with regard to the unique policing context in Northern Ireland.
66. Section 63 is a penal provision. Mr McKay submits that Commissioner failed to apply it strictly. If there is more than one interpretation it must be interpreted in favour of the person who would be in jeopardy. Strict is not the same as literal. It must not be interpreted in a manner which would impose a penalty in the face of ambiguity.
67. Mr McKay submitted that the Commissioner's definition of 'received' was too unclear for a penal provision. There was some discussion of the definition that the Ombudsman said the tribunal should apply. Mr McKay agreed with the Commissioner's definition to some extent, in that he accepted that section 63 should cover information generated by the Ombudsman which included or was drawn

from information received by the Ombudsman, but submitted that section 63 was wider than that.

68. Ultimately, the Ombudsman's position, clarified in closed, was that under section 63 it would be a criminal offence for the Ombudsman to disclose any material that (i) would not exist but for information received by the Ombudsman, and (ii) that related to the powers and functions of the Ombudsman.
69. Mr McKay submitted that information would not fall outside section 63 simply because it was anodyne or administrative.

Open oral submissions from the Commissioner

70. The Commissioner's submission is that none of the information relates to the investigation or the issue of public statements. A large proportion of the requested information is administrative and anodyne, and does not contain any reference to the public statement. The information mainly comprises exchanges of emails checking availability.

71. The connection between the information and the power to publish a public statement under section 62 was initially set out by the Ombudsman at p 72 of the bundle in these terms:

“The previous Police Ombudsman published the ... Public Statement ‘in relation to any exercise of his functions under this Part’, ie. Part VII of the 1998 Act.

He subsequently met with a range of media outlets in order to further explain his Public Statement. His contact with the documentary makers was an extension of such work.

Such contact with the media is integral to the issue of a Public Statement and has been continued by the present Police Ombudsman in the issue of her recent Public Statements. It contributes to her performance of her core functions as per section Act 51(4) of the 1998 Act and outlined above.

72. The Commissioner notes that that is a more remote link than the link for which Mr McKay is now contending. The Commissioner submits that there is no connection between any of the disputed information and section 62.

73. The Commissioner understands that it is now asserted that the intrinsic relationship is between section 51(4) and section 62, rather than section 63. There is no dispute that the generalised duty under section 51(4) is relevant to the exercise of the power under section 62 to publish a statement. The Commissioner's position is that the disputed information is not connected with the exercise of the section 62 power or function that led to the public statement and is therefore not caught by the statutory bar.

74. The Commissioner submits that **Re Hawthorne** relates to a decision to issue a statement and the terms in which it is drafted. These exchanges between members of the Ombudsman's office and the film makers do not relate to a decision to issue a public statement or the terms in which it should be drafted.
75. The Commissioner submits that information which is generated from or worked up from information received by the Ombudsman would be covered by section 63. He does not accept that information purely generated by the Ombudsman would be covered. Contending for an interpretation that includes information purely generated by the Ombudsman introduces the sort of ambiguity that is not permitted under the rules of statutory interpretation.
76. In relation to the 'but for' test put forward by the Ombudsman in closed, the Commissioner submitted that this casts the net far too widely. The Commissioner's view is that 'mixed information', such as an internal report generated on the basis of information received, would be covered. The correspondence in the closed bundle does not fall into that category.
77. The Commissioner submits that he did not err in not identifying additional exemptions. That is not the Commissioner's role.

Additional submissions received after the hearing

78. The tribunal gave the parties the opportunity to make further submissions in relation to paragraph 4.30 of the Police Ombudsman for Northern Ireland's Review under Section 61(4) of the Police (Northern Ireland) Act 1998 dated 6 November 2020 ('the five year review').¹ This had not been referred to in the hearing, but as the tribunal was considering including it in the decision, it was appropriate to allow the parties the opportunity to comment on the relevance of the document, if any. The tribunal took account of the short additional submissions made by the parties.

Discussion and conclusions

Documents outside the scope of the request

79. It was agreed between the Commissioner and the Ombudsman that documents 27-35 within the closed bundle were outside the scope of the request. We have reviewed those documents and agree that they were outside the scope of the request and therefore they do not need to be disclosed. We have not considered those documents further.

Raising additional exemptions

¹ https://www.policeombudsman.org/getmedia/88cf2fe8-e3b5-4441-9f82-b5c37272d8de/Five-Year-Review-@-6-November2020_1.pdf?ext=.pdf

80. The Commissioner is not obliged to consider exemptions that are not raised by the public authority. In any event, additional exemptions can be and have been raised before the tribunal.
81. The Ombudsman first indicated in its reply that it wished to rely on additional exemptions. The tribunal considered that it was in the interests of justice to allow the Ombudsman to rely on section 30 and section 42. We decided that this should be determined at a separate hearing because the Commissioner had had no notice that this would be dealt with in the hearing on 5 October 2023.

Section 44 – statutory prohibition on disclosure

82. The Ombudsman relies on section 63 of the Police Act 1998:

“(1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies.”

83. The text of a provision, as it would be reasonably understood, is the starting point, but the text should be read in the context of the Act as a whole and in its legal, social and historical context. The statutory context is set out above, under ‘Statutory and factual background to the appeal’ and in the open annex.
84. The proposal for an independent Ombudsman arose, in part, out of issues with public confidence in the existing police complaints system and the need for it to be seen to be properly independent from the police force.² The function of the Ombudsman is to investigate and prepare reports on complaints about the conduct of a member of the police force made by, or on behalf of the public and to conduct formal investigations of her own motion in relation to the conduct of members of the police force in certain circumstances.
85. After investigation the Ombudsman can, depending on the circumstances, refer the matter to the Director of Public Prosecutions (“DPP”), determine that the matter is suitable for resolution by mediation or recommend or direct disciplinary proceedings.
86. The Ombudsman also has the power to investigate a current practice or policy if she has reason to believe that it would be in the public interest to do so.
87. Finally, under section 62 the Ombudsman ‘may, in relation to any exercise of [her] functions under this Part, publish a statement as to her actions, her decisions and determinations and the reasons for her decisions and determinations.’

² <https://www.policeombudsman.org/getmedia/c5e06d34-1428-4b65-b1b9-b78f3c4d9a89/PONI-20th-anniversary-Book.pdf>

88. According to the Ombudsman's Review under Section 61(4) of the Police (Northern Ireland) Act 1998 dated 6 November 2020 ('the five-year review'): ³ 'The Ombudsman uses this provision to publish significant public statements on historical and current investigations as well as the publication of cases studies in annual and thematic reports and in press articles'. (para 1.9).
89. The Ombudsman has two investigations directorates – the Current and Historical Investigations Directorates. The Historical Investigations Directorate 'investigates grave or exceptional matters relating to the actions of police officers during the conflict in Northern Ireland between 1968 and 1998 (commonly known as "The Troubles")'⁴.
90. Under section 51(4) the Ombudsman is required to ('shall') exercise her powers 'in such manner and to such extent as appears to her to be best calculated to secure' the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and of members of the police force in that system.
91. The relevant social and historical context in Northern Ireland includes a long history of sectarian violence and a sharply divided society. This means that 'the public' and 'members of the police force' will include people with different sectional community interests. As Mr McKay put it, under section 51(4) it is for the Ombudsman to decide the manner in which she exercise her powers to secure the confidence of two opposing groups of the public in a divisive environment.
92. It is in this context that section 63 must be construed. We note that section 63 contains the word 'received' and the phrase 'in connection with any of the functions' of the Ombudsman. Both of these operate to limit the scope of the section. The section could have been drafted more widely to apply to all information 'held' by the Ombudsman in connection with any of her functions. It could have been drafted to apply to all information received by the Ombudsman, or all information held by the Ombudsman. Given that the provision is penal, it is not surprising that it was not so widely drafted.
93. We do not accept that the section is intended to cover any information *held* by the Ombudsman the disclosure of which would run the risk of revealing the identity of persons who could be targeted by terrorists or could lead to the 'jigsawing' of different strands of information to achieve that purpose. That is not the provision that has been enacted.
94. The legislature has chosen to use the word 'received' to provide a boundary to the information covered by section 63. In the light of the context above, the legislature must have chosen the word 'received' because its intention was to ensure the confidentiality of information provided to the Ombudsman *by a third party*.

³ <https://www.policeombudsman.org/getmedia/88cf2fe8-e3b5-4441-9f82-b5c37272d8de/Five-Year-Review-@-6-November->

⁴ <https://www.policeombudsman.org/About-Us/Current-Investigations>

95. This is particularly important in the social and historical context because (a) there must be public confidence in the Ombudsman and (b) there are real risks to the personal safety of those making complaints and those named in complaints or those who could be identified by terrorists piecing together information. Making section 63 subject to a criminal penalty is intended to give confidence to the public and to those making complaints and ensures that the Ombudsman can carry out her investigative functions effectively in the specific circumstances in Northern Ireland.
96. In our view, the meaning of 'received' contended for by the Commissioner conveys the intention that we attribute to the legislature. 'Received' clearly covers information sent to the Ombudsman by a third party. If the Ombudsman generates information that includes or is drawn from information provided by a third party, we consider that this is also information 'received'. The section applies to information, not documents, and we think that the information contained in such a document would still have been received from a third party. The information comes from an external source. Disclosing it would undermine the purpose of the section, because the confidentiality of information provided by those making complaints would be undermined.
97. We do not accept that the word 'received' can bear the meaning contended for by the Ombudsman. Information that would not have existed 'but for' information received from a third party may not contain or even refer to information provided by a third party. It has not come from a third party and so its disclosure would not undermine the confidentiality of information provided by those making complaints.
98. We have not found the presumption against doubtful penalisation to be of particular assistance in this case. First, we note the reservations expressed in another context by the Upper Tribunal in **Gordon v Information Commissioner and HMRC** [2020] UKUT 92 (AAC) at paragraph 25:

"25. In his skeleton – but not in oral argument at the hearing – Mr Gordon relied on the presumption against doubtful penalisation, as discussed in *R v Dowds* [2012] 1 WLR 2576. I do not accept that argument, for two reasons. The first reason is that, whatever may be the case when section 19 is used in a criminal context, it is not so used in relation to FOIA. It is relevant to FOIA only because section 23 adopts the definition from section 19(2); FOIA does not involve any penal element. And, having adopted the definition, it applies it only to section 18(1) without the restrictions in sections 18(2) and (3), which are part of the definition of the criminal offence. The use of a criminal definition is purely for convenience. I consider that there is no scope for the presumption to arise. The second reason is that the presumption is just that, a presumption. It is not a rule and may have to give way to other principles, and is only applied as a last resort (at [37]). In this case, given my analysis of the definition, I consider that there is no scope for the presumption given the clear meaning of the legislation."

99. That appeal concerned a statutory prohibition contained in the Commissioners for Revenue and Customs Act 2005 (CRCA). Although the route to the statutory prohibition in the CRCA is fairly tortuous and the penal provision only comes in indirectly, in our view the two points made by Upper Tribunal Judge Jacobs remain valid: FOIA does not involve a penal element and the presumption is just a presumption.
100. Second, we do not accept that the Commissioner's contended interpretation is unclear, and therefore it does not, in our view, offend against the presumption of doubtful penalisation. In our view the presumption, if it assists at all, points to the Commissioner's interpretation being the correct one. The presumption is based on the need to warn people of potentially adverse consequences of their actions. We do not accept that section 63 gives a fair warning that it would be a crime to disclose information that would not have existed *but for* some information received from a third party.
101. In our view, the wide construction of section 63 contended for by the Ombudsman would be unworkable and is uncertain. It would cover vast quantities of information held by the Ombudsman, and it may be difficult to identify from a document itself whether or not it would have existed 'but for' information received by the Ombudsman.
102. For those reasons we do not accept that information falls within the scope of section 63 if it is generated by the Ombudsman unless it includes or is drawn from information provided to the Ombudsman by another party.
103. We note that our conclusions above appear to accord with the Ombudsman's publicly expressed understanding of section 63. In her five-year review, the Ombudsman says the following about section 63:
- "The Ombudsman and her staff are prohibited from disclosing information obtained for the purposes of her functions except for certain statutory purposes including the purposes of any civil, criminal or disciplinary proceedings. Any person who discloses this information is guilty of a criminal offence." (para 1.10)
104. In the context of amendments that would be needed to accommodate any new information sharing arrangements with other bodies such as other police oversight bodies and ombudsmen, the Ombudsman stated:
- "Section 63 of the 1998 Act prohibits the Ombudsman and her staff from disclosing any information obtained for the purposes of any of her statutory functions with certain exceptions for certain purposes. These include for the purposes of any civil, criminal or disciplinary proceedings. The operation of this statutory bar is important to protect the confidentiality of the information provided to the Ombudsman by any other party." (para 4.30)

105. Those extracts from the five-year review suggest that the Ombudsman's view of the meaning and purpose of section 63 accords with the tribunal's view. It applies to information 'obtained' by the Ombudsman. It is aimed at protecting the confidentiality of information 'provided to the Ombudsman by any other party'.
106. Applying the definition of 'received' set out above, we have concluded that some of the information in the closed bundle does not fall within the scope of section 63 and is not exempt under section 44. The specific pages are identified in the closed annex to this decision.
107. Not all information received by the Ombudsman will fall within section 63. The information must have been received 'in connection with' any of the functions of the Ombudsman. In our view the information does not in itself have to have any connection with a function. On an ordinary reading of section 63 we find that the phrase 'in connection with any of the functions' qualifies 'received' not 'information'.
108. The words 'in connection with' can have a broad or narrow meaning in literal terms. We have gained some assistance from the Court of Appeal's discussion of the meaning of this phrase in other contexts in **London Luton v HMRC** [2023] EWCA Civ 362.
109. The Court of Appeal referred to the House of Lords in **Coventry Waste and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer) ("Coventry Waste")** [1999] 1 WLR 2093 in which Lord Hope said as follows:
- "It may be that in some contexts the substitution of the words "having to do with" will solve the entire problem which is created by the use of the words "in connection with." But I am not, with respect, satisfied that it does so in this case, and Mr Holgate [Counsel for the Valuation Officer] did not rely on this solution to the difficulty. As he said, the phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the [1989 Order] and its wider context, which provide the best guide to a sensible solution of the problem which has been created by the ambiguity."
110. The Court of Appeal said the following at paragraphs 63 – 69 about the phrase 'in connection with':
- "63. *Coventry Waste* therefore stands for the proposition that the words will usually take their meaning from those which surround it and the wider context, and that courts and tribunals may have to determine whether the words have a broad or a narrow meaning, understood in context. In literal terms, both meanings are possible.

64. In *Barclays Bank plc & Trustees of the Barclays Bank Pension Fund v HMRC* [2007] EWCA Civ 442, [2008] STC 476 (“Barclays”), Arden LJ observed that the words “in connection with past service”, which appeared in s.612(1) of the Income and Corporation Taxes Act 1988, could describe a “range of links” (see [18]). This fits with *Coventry Waste* (to which Arden LJ referred) in suggesting that different meanings are possible. Arden LJ also referred at [19] to the need to examine the function or purpose of the legislation, and at [30] to the purpose of the legislation potentially informing the court’s thinking where there is a choice of meaning.

65. *Heron’s Court v Heronslea* [2019] EWCA Civ 1423, [2019] 1 WLR 5849 is a decision of the Court of Appeal which was not cited to us but provides a useful illustration of the principles discussed in *Coventry Waste* and *Barclays*. It concerned s.1(1) of the Defective Premises Act 1972 which provided that “a person taking on work for or in connection with the provision of a dwelling ... owes a duty to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner...”. The issue was whether an approved inspector owed such a duty. Hamblen LJ decided that the approved inspector did not owe such a duty under the statute:

“38. In the present case the context includes the whole of section 1(1), not just the words: “A person taking on work for or in connection with the provision of a dwelling ...”. This includes that the duty relates to how “the work which he takes on is done” and that it is done “with proper materials”. The focus is therefore very much on the doing of work.

39. That work also has to relate to the “provision of a dwelling”. This suggests the bringing of that dwelling into physical existence or its creation. This is consistent with how these words have been interpreted in other cases. For example, *Jacobs v Morton* (1994) 72 BLR 92, 105: “In my judgment, this phrase connotes the creation of a new dwelling” per Mr Recorder Jackson QC; *Saigol v Cranley Mansions Ltd* (unreported) 6 July 1995; [1995] CA Transcript No 658: “Mr Ticciati was in my view correct in submitting the ‘provision’ was a word which prima facie involved the creation of something new”, per Hutchison LJ.

40. The emphasis is therefore on those who do work which positively contributes to the creation of the dwelling. That may include architects and engineers who prescribe how the dwelling is to be created, not just those who physically create it. It does not, however, include those whose role is the essentially negative one of seeing that no work is done which contravenes building regulations. Building control ensures that the dwelling is legal and properly certified, but it does not positively contribute to the provision or creation of that dwelling.”

66. Although it is not a case on the meaning of 'in connection with', some further assistance can be derived from *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] 1 WLR 1093, [1978] STC 460. That case concerned the availability of capital allowances under section 41(1) of the Finance Act 1971, which contained the words "expenditure on the provision of machinery or plant". The dispute related to interest and commitment fees incurred on the financing of an oil rig called the Ocean Tide and whether those payments could be said to be expenditure "on the provision of" the rig. The House of Lords held (Lord Salmon dissenting) that capital allowances were not available.

67. Lord Wilberforce held that they were too remote to qualify, see p. 1098 E-F:

"... The words 'expenditure on the provision of' ... focus attention on the plant and the expenditure on the plant, not limiting it necessarily to the bare purchase price, but including such items as transport and installation, and in any event not extending to the expenditure more remote in purpose. In the end the issue remains whether it is correct to say that the interest and commitment fees were expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision of plant and so not within the subsection. This was the brief but clear opinion of the Special Commissioners and of the judge and little more is possible than after reflection to express agreement or disagreement. For me, only agreement is possible. I would dismiss the appeal."

68. Lord Hailsham of St Marylebone posed the question at p. 1099 D-E:

"... whether a narrow or a broad construction is to be placed on the words. The taxpayer company contended that the words include all items properly incurred in the provision of the Ocean Tide which would include the cost of financing the payment for it. For the Crown it was argued that the only expenditure on the provision of the Ocean Tide was, in effect, its price, and that the commitment fees and interest were not expended on the provision of the Ocean Tide within the meaning of s41(1) but on the provision of the money to pay for it and that this for the purposes of the subsection is to be regarded as a distinct and separate operation."

He concluded that the statutory words, in context, bore the narrower of the two meanings at p. 1099 F (with reasons for that conclusion given at pp. 1100 F-1101 C):

“In my view the actual words of the statute are capable of bearing either construction according to the context in which they are used, but, at the end of the day, I agree with the judgment of Brightman J and the view of the Special Commissioners that in the context of s41(1) of the 1971 Act they bear the narrower of the two meanings, that is that contended by the Crown.”

69. These cases show that the meaning of “on, or in connection with” is heavily dependent both on context and policy. The phrase might require what Robert Walker LJ in *Coventry Waste* referred to as “a strong and close nexus” or it might require “a weak and loose one”. *Ben-Odeco v Powlson* introduces the concept of remoteness, which is another way of considering the same question.”

111. What we draw from the cases above is that the phrase ‘in connection with’ can bear a broad or a narrow meaning, and that the wording of the statute and its wider context are the best guide to its meaning.
112. that In determining the meaning of the words ‘in connection with’ as they appear in section 63, the following points emerge from their context.
113. First, we concluded above that the intention of the legislature was to ensure the confidentiality of information provided to the Ombudsman by a third party.
114. Second, as we set out above, this is particularly important in the social and historical context because (a) there must be public confidence in the Ombudsman and (b) there are real risks to the personal safety of those making complaints and those named in complaints or those who could be identified by terrorists piecing together information. Prevention of inappropriate disclosure was considered so vital that a criminal sanction was attached to section 63.
115. Third, the link to the Ombudsman’s functions, in our view, reflects the dual purpose of giving confidence to the public and to those making complaints and ensuring that the Ombudsman can carry out her investigative functions effectively in the specific circumstances in Northern Ireland.
116. Fourth, the provision could have been, and is not, expressly limited to confidential information. It could have been, and is not, limited to information obtained for the purposes of, or in the discharge or exercise of any functions of the Ombudsman.
117. In our judgment these contextual features point towards the words ‘in connection with’ being construed relatively broadly, to minimise the risk that confidential information provided to the Ombudsman in relation to her investigations and other functions falls outside the section.

118. However we find that the connection should not be construed so broadly that it would include any information provided to the Ombudsman or information that is only remotely connected to the Ombudsman's functions. Such an interpretation would be so broad as to make the requirement of a connection to the functions effectively meaningless, and is not supported by the contextual background highlighted above.
119. The nature or content of the information itself will only be relevant in so far as it assists in identifying the connection between its receipt and any of the Ombudsman's functions.
120. In those circumstance we conclude that the words 'in connection with' do not require a strong and close nexus between the provision of the information and a function of the Ombudsman, but that there must be more than a remote nexus between the provision of the information and one of the Ombudsman's functions.
121. The function relied on in this appeal is the power in section 62 of the Police Act 1998 to publish a statement as to the Ombudsman's actions, decisions and determinations and the reasons for her decisions and determinations.
122. We accept that section 51(4) is relevant. Under section 51(4) the Ombudsman must exercise that power in such manner as appears to her to be best calculated to secure, inter alia, the confidence of the public and of members of the police force in the police complaints system.
123. We accept, on the basis of the contents of the email at page 18 of the closed bundle, that the purpose of the Ombudsman's engagement with the film makers was to help ensure accurate reporting of the Ombudsman's findings in the 2016 public statement. Those efforts were at least reasonably closely related to the Ombudsman's functions under section 62.
124. Although it is one step removed from the function in section 62, we accept that substantive information provided to the Ombudsman as part of the Ombudsman's efforts to ensure accurate reporting of the statement was provided 'in connection with' the function under section 62.
125. Information provided for the purposes of making administrative arrangements for the purposes of having discussions for the purposes of the Ombudsman's efforts to ensure accurate reporting is at least one more step removed from the function in section 62. We find that the provision of this information is no more than remotely connected to any of the Ombudsman's functions. In our view this type of information is not received in connection with the Ombudsman's functions.
126. Taking all this into account we have considered which information in the closed bundle was received by the Ombudsman in connection with her power to publish a statement under section 62. Our specific findings in relation to each document

in the closed bundle are set out in the closed annex, but our broad conclusions are as follows.

127. Where substantive information was provided to the Ombudsman as part of the Ombudsman's efforts to help ensure accurate reporting of the Ombudsman's 2016 public statement, we accept that this information was received by the Ombudsman in connection with her power to publish a public statement.
128. Where the correspondence was generated by the Ombudsman but either includes or is drawn from information provided by a third party that falls within section 63, we accept that this is information received by the Ombudsman in connection with her power to publish a public statement.
129. Where the emails or letters contain information provided purely to facilitate administrative arrangements for organising meetings, we do not accept that they contain information sent to the Ombudsman in connection with her power to publish a public statement. The provision of that information does not have a sufficiently close nexus to the relevant function. It is only remotely connected.
130. For those reasons we conclude that the decision notice was not in accordance with the law, because we have determined that some of the information is exempt under section 44. The appeal is allowed in part.

Next steps

131. The Ombudsman has raised other exemptions. Accordingly it is not appropriate to issue a decision notice at this stage.
132. Any order that we make for disclosure will permit the redaction of personal information.
133. As we have concluded that the relevant page is exempt under section 44, there is no need to consider legal professional privilege on a later occasion.
134. The Judge has made a separate case management order directing the Ombudsman to indicate if she still intends to rely on section 30. Once that direction has been complied with, further case management directions will be made.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 24 October 2023

OPEN ANNEX

Extract from in **Re R216's Application for Judicial Review** [2022] NIKB 28:

"Relevant statutory provisions"

[6] The Ombudsman's powers are governed by the statutory regime set out in Part VII of the 1998 Act. I do not propose to set out the relevant provisions at any length; but the statutory scheme provides important context for the central grounds advanced by the applicants. Section 52 is an important provision, governing the receipt and initial classification of complaints. Inter alia, the Ombudsman must determine whether a complaint is one to which section 52(4) applies, that is "a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public" but *not* a complaint "in so far as it relates to the direction and control of the police force by the Chief Constable" (see section 52(5)). Section 54 provides for the formal investigation of certain complaints, which are then investigated in accordance with section 56. Section 55 permits the Ombudsman to consider other matters, including the formal investigation "of [her] own motion" of any matter which "appears to the Ombudsman to indicate that a member of the police force may have (i) committed a criminal offence; or (ii) behaved in a manner which would justify disciplinary proceedings; and ... is not the subject of a complaint" if that appears to her desirable in the public interest (see section 55(6)).

[7] The process for a formal investigation by the Ombudsman is sketched out in section 56. An officer of the Ombudsman must be appointed to conduct the investigation. The Department of Justice ("the Department") may by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 shall apply; and it has done so (see the Police and Criminal Evidence (Application to Police Ombudsman) Order (Northern Ireland) 2009). At the end of an investigation under section 56, the person appointed to conduct the investigation shall submit a report ("the investigation report") to the Ombudsman (see section 56(6)).

[8] Sections 58 and 59 are important in the present context. They provide for steps to be taken *after* investigation by the Ombudsman, either in terms of criminal proceedings or disciplinary proceedings against a police officer. The Ombudsman must consider the investigation report "and determine whether the report indicates that a criminal offence may have been committed by a member of the police force" (see section 58(1)). If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, she shall send a copy of the report to the Director of Public Prosecutions ("DPP") together with such recommendations as appear to her to be appropriate (see section 58(2)). If there is no indication in the investigation report that a criminal offence may have been committed by a member of the police force

and the complaint is not a serious one, the Ombudsman may determine that the complaint is suitable for resolution through mediation (see section 58A).

[9] If the Ombudsman determines that the investigation report does not indicate that a criminal offence may have been committed by a member of the police force (and the complaint is not suitable for resolution through mediation) *or* the DPP decides not to initiate criminal proceedings in relation to the subject matter of a report which the Ombudsman has sent to him *or* criminal proceedings so initiated have been concluded, the Ombudsman shall then consider the question of disciplinary proceedings (see section 59(1)-(1B)). She shall then send the appropriate disciplinary authority a memorandum containing her recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation. The Ombudsman also has powers to direct the Chief Constable to bring such disciplinary proceedings.

[10] Additionally, under section 60A(1) the Ombudsman “may investigate a current practice or policy of the police if (a) the practice or policy comes to [her] attention under this Part, and (b) [she] has reason to believe that it would be in the public interest to investigate the practice or policy.” Where the Ombudsman decides to conduct an investigation of this type, she must immediately inform the Chief Constable, the Policing Board and the Department of her decision and her reasons for making it (see section 60A(3)).

[11] The Ombudsman must make certain reports relating to her functions under section 61, which is not relevant for present purposes. These proceedings are largely concerned with the meaning and effect of section 62, entitled ‘Statements by Ombudsman about exercise of [her] functions’, although the statements so issued are frequently referred to as ‘reports.’ Section 62 provides simply as follows:

“The Ombudsman may, in relation to any exercise of [her] functions under this Part, publish a statement as to her actions, her decisions and determinations and the reasons for her decisions and determinations.”

[12] Section 63 relates to restrictions on disclosure of information received by the Ombudsman or one of her officers. It is potentially relevant to the question of publication of information in a section 62 statement.”