

Neutral citation number: [2024] UKFTT 001052 (GRC)

Case Reference: FT/EA/2024/0225

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Heard Remotely by CVP  
Heard on: 28 October 2024  
Decision given on: 05 December 2024**

**Before**

**DISTRICT JUDGE WATKIN  
MEMBER DR MANN  
MEMBER PALMER DUNK**

**Between**

**LOWER OLDPARK COMMUNITY ASSOCIATION**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondents

**Representation:**

For the Appellant: In person

For the Respondent: No attendance

**Decision:** The Appeal is allowed

**Substituted Decision Notice:**

1. The Freedom of Information Act 2000 applies to the Appellant's request for information.
2. The Appellant has requested information which is prohibited from disclosure pursuant to s.49 Public Service Ombudsman (Northern Ireland) Act 2016.
3. Section 44 of the Freedom of Information Act 2000 applies an exemption to disclosure where an enactment prohibits disclosure.
4. Section 44 is an absolute exemption.
5. The NIPSO is not required to disclose the information requested.

## REASONS

### BACKGROUND

1. This Appeal (by the Lower Oldpark Community Association (the “**Appellant**”) arises following a request for information (the “**Request**”) (C104) made by the Appellant to the Northern Ireland Public Services Ombudsman (“**the NIPSO**”) on 25 July 2023 for the following information:

*“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 the NIPSO that relate to the complaints made by (the Appellant) against the NIHE*

*All NIPSO internal communications that relate to the complaints made by (the Appellant) against the NIHE.”*

2. The Background is that the Appellant had raised concerns with NIHE about the disposal of land for development. On not receiving a response it considered to be satisfactory, the Appellant decided not to continue with the NIHE complaint procedure but to complaint directly to the NIPSO which it states it is entitled to do.
3. However, the NIPSO stated that it would not investigate the matter until the complaint procedure with NIHE had been exhausted.
4. The Appellant’s position is that there were communications between the NIPSO and NIHE in relation to the investigation and that the NIHE persuaded the NIPSO not to consider the complaint. The Appellant requested that the NIPSO disclosed details of its correspondence with NIHE during the relevant period. The Appellant states that it had received communications from the NIHE indicting that NIHE had been in communication with the NIPSO in relation to the Appellant’s complaint.
5. The NIPSO responded on 7 August 2023 indicating that the Freedom of Information Act 2000 (“**FOIA**”) was the appropriate legislation but that the response would be made in the context of the Environmental Information Regulations 2004 (“**EIR**”) with reference to FOIA. The NIPSO indicated that it was withholding the requested information a citing regulation 12(5) EIR and 44 FOIA (confidentiality of proceedings where confidentiality is provided by law) together with sections 30(5) and 49 of the Public Services Ombudsman Act (Northern Ireland) 2016 (“**the 2016 Act**”).

### 31 August 2023 – Request for Review

6. On 31 August 2023, the Appellant requested a review from the NIPSO pointing out that the NIPSO had not applied the public interest test pursuant to 12(1)(b) EIR in

considering its decision. The Appellant considered that there was a general public interest in the disclosure of environmental information, stating that it supports the right of everyone to live in an adequate environment and to contribute to a better environment.

7. The Appellant set out in the letter that it considers that the NIPSO is the last option for those who feel they have suffered because of maladministration by a public body and that its role is to ensure justice and fair treatment, for which transparency and accountability are essential in maintaining public confidence in NIPSO in respect of those decisions.
8. Further, the Appellant set out that it suspected the NIPSO of wrongdoing and that disclosure of the requested information would shed light on this and would serve the wider public interest by clarifying whether the NIPSO acted in accordance with the principle of fairness. The Appellant states the basis for its suspicion of wrongdoing is due to the NIPSO acting unfairly by responding to pressure from the NIHE to require the Appellant to use its complaints procedure without considering whether it was appropriate for it to investigate the complaint. The Appellant considers that *“the NIPSO ignored or gave insufficient regard to the arguments raised by (the Appellant) and failed to carry out any, or sufficient, investigations in response to (the Appellants) arguments”*.
9. The Appellant considers that the NIPSO ignored the specific nature of its complaints due to the public profile of the NIHE Board Chairperson and the intervention of the NIHE Chief Executive in the process and, thereby, avoided any embarrassment for the NIHE Chairperson who retired from the role in November 2022.
10. The Appellant also indicates that it considers the information requested to be environmental information for the purposes of EIR. Additionally, reference is made to the Data Protection Act 2018.

## **26 September 2023 - Review**

11. On 26 September 2023, the NIPSO responded to the request for a review and confirmed that it was maintaining its position and considered the public interest test. The statutory duty under section 49 of the 2016 Act was considered and the view taken that it creates an expectation, among those involved in investigations, that any information gathered will not be disclosed and that releasing this information to other interested parties would undermine this expectation, breach the trust placed in the NIPSO and, therefore, adversely affect the NIPSO's ability to carry out its statutory function.
12. The review also confirmed that the initial response examined both the position under EIR and FOIA and concluded that the information would not be disclosable under either scheme.

## **Complaint to the ICO**

13. There is no evidence that the Appellant responded to the above review but, on 25 October 2023 (date on the letter) or 1 November 2023 (date in the Decision Notice), a complaint was sent to the Information Commissioner (the “ICO”) in respect of the refusal by the NIPSO to provide the information in response to the Request (“C118”).
14. The ICO’s decision is recorded in a decision notice (the “**Decision Notice**”) dated 21 May 2024. Within the Decision Notice, the ICO states that it wrote to the Appellant and explained that there were only a small number of documents which may fall within the scope of the request. As such, the NIPSO offered the Appellant the opportunity to visit its offices to view the documents. The intention was that if, having reviewed the documents, the Appellant identified any which it considered should be disclosed then the NIPSO could reconsider the request in relation to those specific documents.
15. The Appellant visited the offices of the NIPSO so on 28 March 2024 and 18 April 2024.

## **ICO’s Decision**

16. The ICO sets out the background to the NIPSO’s processes and, in particular, that the NIPSO had closed the Appellant’s complaint on deciding that it had no jurisdiction. The basis for this conclusion has not been set out. However, the ICO also sets out details of the search for information which the NIPSO had carried out on receiving the Request. This included reference to the fact that emails are deleted after 3 months, and the Request was received 7 months after the complaint was closed. However, no indication is given of whether email accounts or back up storage facilities were searched.
17. The ICO concluded that, on the balance of probabilities, the NIPSO does not hold any further recorded information falling within the scope of the Request, emphasising that it is not within the remit of the ICO to consider what information the NIPSO should hold.

## **THE ISSUES**

18. The issues to be determined are:
  - a. Is the relevant legislation EIR or FOIA?
  - b. Is the information held by the NIPSO at the time of the Request (Section 1(4) FOIA and regulation 12(4)(a) EIR)?
  - c. If FOIA applies and relevant information is held, does section 44 apply?
  - d. If EIR applies and relevant information is held:
    - i. Is it excepted by regulation 12(4)(e) (internal communications)?
    - ii. Is it excepted by regulation 12(5)(d)?

- iii. If the information is excepted pursuant to section 12(4)(a) or (e) or 12(5)(d), does the public interest in maintaining the exception outweigh the public interest in disclosure?

## **THE RELEVANT LAW**

### **Jurisdiction**

19. The Tribunal's jurisdiction is set out at section 58(1) of FOIA which provides that the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal where the Tribunal considers that the notice is not in accordance with the law or that the Commissioner should have exercised his discretion differently.
20. Section 58(2) gives the Tribunal power to review any finding of fact on which the notice was based.
21. Section 39 of FOIA provides that information is exempt information if the public authority is obliged by the EIR to make the information available to the public or would be so obliged but for any exemption within the regulations.

### **Freedom of Information Act 2000**

22. Section 1 FOIA
  - “(1) Any person making a request for information to a public authority is entitled –
    - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
    - (b) if that is the case, to have that information communicated to him.”
23. Section 1(4) provides that *“the information ...is the information in question held at the time the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”*
24. Section 2(2) provides that the public authority is not obliged to provide the information as required by section 1(1) where:
  - a. an absolute exemption applies (as listed in s.2(3)); or
  - b. one of the exemptions set out in Part II applies and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

25. By Section 44, information is exempt if the disclosure of the data is prohibited under any enactment. This exemption is absolute (s.2(3)(h)).
26. Information is exempt from disclosure under FOIA if the public authority is obliged to make the information available in accordance with EIR or would be so obliged save for any exemption within those regulations.

#### **Environment Information Regulations 2024**

27. A public authority that holds environmental information is required to make it available on request (reg. 5(1) EIR).
28. Environmental Information is defined at Regulation 2(1) as information on:
  - “ (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.*
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
  - (d) reports on the implementation of environmental legislation;*
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”*
29. Exceptions to the duty to disclose are set out at regulation 12.
30. Pursuant to regulation 12(1)(b) a public authority can only refuse to disclose information based on an exception under paragraph 12(4) or (5) if:

*“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”*

31. Pursuant to regulation 12(2) a presumption in favour of disclosure applies.
32. The exceptions at regulation 12(4) apply provided that the information is of the nature described. Whereas for the exceptions at regulation 12(5) to apply, disclosure may be refused to the extent that the disclosure would have an adverse effect on the matters set out.
33. Regulation 12(4)(a) states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
34. Regulation 12(4)(e) states that a public authority may refuse to disclose information where it would involve the disclosure internal communications and regulation 12(8) extends this to communications between government departments.
35. Regulation 12(5)(d) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
36. There is no exemption within FOIA which is equivalent to regulation 12(4)(e) (internal communication).

### **The Public Interest Test**

37. The public interest test is to be carried out on the date that the request for information is decided (*Montague v IC and DIT* [2022] UKUT 104 (AAC) at [47]-[90]).
38. In *O'Hanlon v IC* [2019] UKUT 34 (AAC) at [15], the Upper Tribunal considered:

*"The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did":*
39. The Tribunal will weigh up the actual harm that the proposed disclosure may cause with the potential benefits of its disclosure *APPGER v IC* [2013] UKUT 560 at [74]-[76] and [146]-[152]. In doing so, the Tribunal will consider the content of the information and the possible consequences of disclosure or non-disclosure.

## **Public Services Ombudsman (Northern Ireland) Act 2016**

40. Section 30(6) of the **Public Services Ombudsman (Northern Ireland) Act 2016 (2016 Act)** states:

*“... the procedure for conducting an investigation is to be such as the Ombudsman considers appropriate in the circumstances of the case.”*

41. Section 49 of the 2016 Act provides that the information obtained by the Ombudsman in deciding whether to begin an investigation, during an investigation or in resolving a complaint under section 10, must not be disclosed except in certain specified circumstances none of which are likely to apply (s.10 of the 2016 Act).
42. “Information” for the purposes of section 49 is not defined.

### **DOCUMENTS**

43. Prior to the hearing, the Tribunal was provided with a 364-page open bundle plus two separate documents (the “**Separate Documents**”):
- a. A letter dated 8 August 2022 from the Complaints Officer at NIHE
  - b. An email dated 8 August 2022 from the Complaints Officer at NIHE
44. Any references to page numbers within this decision are to page numbers within the open bundle.
45. The open bundle includes the NIPSO Procedural Manual dated June 2023 (page A26) and the NIPSO Procedural Manual dated 24 April 2017 (page D239A26). However, no document retention or storage policies were provided or relied on.
46. NIPSO’s WorkPro records are found at page D359. The documents within the system and which relate to the Appellant’s complaint are listed but have not been provided to the Tribunal either within a closed bundle or otherwise.

### **THE HEARING**

47. The Tribunal heard submissions and evidence from Mr Gary Hughes on behalf of the Appellant. The ICO did not attend and was not represented.

### **EVIDENCE AND ANALYSIS OF EVIDENCE**

#### **The Appellant**

48. Mr Hughes spoke openly and was as helpful as could be expected. The Tribunal accepts that he is not legally qualified. He struggled to respond to the Tribunal’s



questions in relation to whether the Request should have been dealt with under FOIA or EIR. He had understood from the ICO that EIR was the correct legislation. He also indicated that EIR was his preference as, under EIR, the Appellant could rely on the public interest test under regulation 12(1)(b) whereas section 44 of FOIA is absolute.

49. On being asked how he could be sure that the NIPSO held the information, Mr Hughes confirmed that he did not know precisely what information was held but that he did know that some information was held. He referred to the screen shots from the NIPSO's WorkPro records (page D359) and confirmed that he had been shown some documents when he was encouraged to attend the NIPSO offices on a voluntary basis but that he could not be sure which documents. He was also clear that he had not wanted to attend on a voluntary basis to view some of the documents. In particular, he referred to the Separate Documents which he indicated refer to correspondence between the NIPSO and NIHA which he had not been shown when he attended the NIPSO's offices for voluntary disclosure.
50. Mr Hughes referred to the fact that no correspondence between NIHE and the NIPSO was shown on the WorkPro screenshots, save for correspondence dated 4 August 2022. He was able to show that document could not have been the correspondence referred to in the Separate Documents as the letter dated 2 August 2022 from the NIPSO to the Appellant confirms that the Appellant should await the outcome of the NIHE's Complaints Procedure. Therefore, by this point, the decision as to whether to investigate the complaint appeared to have been made, leading Mr Hughes to form the view that the correspondence referred to in the Separate Documents must have pre-dated 2 August 2022 and could not be the email of 4 August 2022.
51. Mr Hughes acknowledged that either section 44 of FOIA or 12(5)(e) of EIR would apply, depending on which statutory instrument was applicable. As previously stated, his preference was for EIR to apply as he believed that the public interest balance would weigh in favour of disclosure.
52. Mr Hughes also accepted that regulation 12(4)(e) of EIR would apply where the communications were internal.
53. From Mr Hughes' evidence, it was apparent that, even though there had been an opportunity to view some information that had been made available voluntarily, he did not consider that satisfactory as he believed that the NIPSO should be compelled to provide all information falling under the terms of his Request, and that it should not simply be left to the discretion of the NIPSO.

## **SUBMISSIONS AND ANALYSIS**

54. Having heard considered the evidence and submissions, the Tribunal considers the issues outlined above in turn, in so far as it is necessary to do so.

## **EIR or FOIA?**

55. EIR will apply to the information instead of FOIA if the information requested is “*environmental information*”. The definition of Environmental Information is set out at regulation 2(1) of the EIR.
56. The information requested is information relating to an investigation of a complaint by the NIPSO. The complaint (page 132) relates to the use of land for development purposes. Therefore, the information concerning the Appellant’s dealings with NIHE is unlikely to be environmental information. However, the information that is sought by the Request does not relate to the land issues but to the procedural issues in relation to the complaint to the NIPSO.
57. It is understood from the evidence of Mr Hughes that the written communications which the Appellant believes to be missing is correspondence relating to the question of whether the NIPSO should progress their investigation. The Tribunal does not consider that this would be environmental information as it is likely to relate only to the question of whether the complaint to the NIHE should be finalised before the investigation takes place, rather any of the matters which the complaint to NIHE considered. As the term “information” is not defined, and in the absence of any other authority, the Tribunal is compelled to conclude that even this correspondence, even though it does not relate to the substantive issues within the complaint, must be considered to “information” for the purposes of the 2016 Act.
58. Whilst it is possible that information held by the NIPSO and subject to the Request involved matters relating to land which is likely to be classed as “environmental information”, having reviewed the list of documents on Work Pro (page D360), the Tribunal concludes that it is unlikely that the information requested is “environmental information”.
59. On balance, as the NIPSO was dealing only with a complaint about NIHE and had determined not to investigate, the Tribunal considers it unlikely that the information requested would be environmental information. It is more likely that the information related only to procedural matters in relation to the complaint and, therefore, the Tribunal concludes that the applicable law is FOIA and not EIR.

## **Is the information held by the NIPSO (Section 1(4) FOIA and regulation 12(4)(a) EIR)**

60. The Tribunal needs to determine whether the information was held by the NIPSO at the date of the Request. If not, then the Appeal does not proceed further as section 1(4) of FOIA provides that the right to information only extends to information “*held at the time the request was received*”.
61. Ordinarily in a case where a public authority denies holding the evidence on the date of the Request, an officer from the public authority would give evidence to say that the public authority does not hold the information. This would usually be sufficient to

result in a determination that, on the balance of probabilities, the public authority does not hold the information. In this Appeal, no such evidence has been provided.

62. It is the Appellant's position that the ICO, however, did not go far enough in establishing the situation and asking to see the information and why it had not been made available. Mr Hughes indicated that they had been encouraged to attend the offices of the NIPSO to view the file. However, he does not consider that was satisfactory as it placed no obligation on the NIPSO to provide the full file.
63. Mr Hughes refers to the Separate Documents which refer to correspondence between the NIPSO and NIHE in relation to this matter. It is not clear why these were not placed within the original open bundle. The Separate Documents were available to the NIPSO and the Appellant.
64. The NIPSO does not deny that there once was such correspondence. However, on behalf of the NIPSO, it is stated that no such information could be retrieved. This is not provided in the form of a witness statement but is only outlined in a letter dated 14 May 2024 (10 months after the date of the Request) from the Legal Officer to the NIPSO to the ICO(D357).
65. Mr Hughes considers that the ICO should have concluded that the NIPSO did hold the information at the time of the Request.
66. It is also noted that the ICO does not appear to have made any enquiries in relation to the deleted material. Whether a public authority would permanently delete emails from its system after 3 months (D359) without ensuring that those emails were backed up elsewhere is questionable. It is noted that there is no mention of whether the information is backed up on any alternative storage facility nor has any data storage or retention policy of the NIPSO been provided. However, the NIPSO also states that:

*"the NIPSO's retention and disposal policy requires that documentation is held on file for 3 years following the last activity on a case,"* (page D359)
67. The Tribunal has been able to review the NIPSO Procedural Manuals dated April 2017 (D239) and June 2023 (page A26 to A90). At page A35, there is reference to the destruction of hard copy documents received. However, there is no reference to the deletion of electronic copies of documents.
68. The 2017 version of the NIPSO Procedural Manual refers on page D244 to a "*records management policy*", on page D359 to "*the NIPSO's retention and disposal policy*" and to "*the office policy on information security*" on page D271. These have not been produced.

69. Surprisingly, not only does the NIPSO not provide a copy of the policies, the NIPSO does not indicate that the emails were even searched, and it does not appear that any consideration was given to whether backup copies are held.
70. In the circumstances of no officer within the NIPSO having provided a signed witness statement confirming that the information is not held, the clear indication that the NIPSO's policy requires documentation to be held on file for 3 years and no enquiries having been made to establish whether the emails are backed up, the Tribunal concludes, on the balance of probabilities, that the relevant information was held by the NIPSO at the time of the Request and that insufficient enquiries have been made to locate it.
71. Furthermore, the NIPSO appears to have focused on the missing communications regarding the question of whether to continue to investigate the complaint or to await the outcome of the complaints process with NIHE. However, that correspondence has been referred to by Mr Hughes as an example only, as there is evidence to show that the correspondence has not been provided. The Request is, in fact, much broader and it does appear from the list of documents within the WorkPro system (D360) that some documents that would fit within the terms of the Request are likely to exist. It is noted that these have not been provided to the Tribunal for consideration, either within a closed bundle or otherwise. Whilst it may be that other exemptions apply to those documents, for example, internal communications (if the information is environmental), the fact that those exemptions have not been highlighted is further evidence that the NIPSO may not have considered the Request in full.

#### **Section 44 (prohibited by enactment) (FOIA)**

72. As the Tribunal has concluded that FOIA applies, consideration also needs to be given to section 44, which provides that information is exempt if the disclosure of the data is prohibited under any enactment. It is suggested that the information is protected from disclosure by s.49 of the 2016 Act.
73. Section 49 protects information obtained by the NIPSO in deciding whether to begin an investigation, during an investigation or in resolving a complaint must not be disclosed except in certain specified circumstances outlined in section 49(2). It is not suggested that any of the specified circumstances apply and neither does the Tribunal consider that any such circumstances apply.
74. Whilst the Tribunal has not had sight of the documents containing the information, as the NIPSO was requested to investigate a complaint, it is considered that all of the information covered by the Request is likely to relate to matters covered by s.49 and, therefore, the Tribunal concludes that the exemption applies and there is no obligation on the NIPSO to disclose the information.

75. This, therefore concludes matters and there is no requirement for the Tribunal to proceed to consider the other issues as outlined at paragraph 18 above and it would not be appropriate for it to do so.

#### **SUMMARY OF DECISION**

76. In summary, after careful consideration, the Tribunal concludes that, on the balance of probabilities, the NIPSO does hold the relevant information. Therefore, the appeal is allowed.

77. However, the Tribunal also concludes that FOIA applies to the information and the disclosure of the information is prohibited by section 44 of FOIA.

78. In the circumstances, the Tribunal provides the Substituted Decision set out above.

#### **APPEAL**

If either party is dissatisfied with this decision, an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Administrative Appeals Chamber, against decisions of the First-tier Tribunal in Information Rights Cases (General Regulatory Chamber). Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Judge R Watkin