

Investigation Report

Investigation of a complaint against the Northern Ireland Environment Agency

NIPSO Reference: 17453

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The Role of the Ombudsman

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

Reporting in the Public Interest

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	1
THE COMPLAINT	3
INVESTIGATION METHODOLOGY	5
THE INVESTIGATION	6
CONCLUSION	23
APPENDICES	25
Appendix 1 – The Principles of Good Administration	
Appendix 2 – The Principles of Good Complaints Handling	

EXECUTIVE SUMMARY

I received a complaint regarding the actions of the Northern Ireland Environment Agency ('NIEA'). The complainant was concerned with how NIEA had dealt with his correspondence regarding the commissioning of an independent engineer's report and providing responses to specific queries regarding planning conditions on a planning application.

Issue of Complaint

I accepted the following issues of complaint for investigation:

1. NIEA handling of a commission for an independent engineer's report it had previously committed to, into the structural integrity of the settlement lagoons at the W&J Chambers Concrete Plant;
2. NIEA record keeping regarding the issue of the commission for an independent report
3. NIEA Complaint handling regarding this matter
4. The extent to which NIEA provided clarification on how NIEA envisaged the implementation of conditions 1 and 2 of the planning application.

Findings and Conclusion

The investigation of the complaint identified maladministration in respect of the following matters:

- NIEA handling of the commissioning of an engineer's report
- NIEA record keeping
- NIEA Complaint handling

I am satisfied that the maladministration I identified caused the complainant to experience the injustice of frustration, outrage, anger, uncertainty, as well as the time and trouble in pursuing his complaint to this office.

Recommendations

I recommended:

- The NIEA Chief Executive should apologise for the failings identified in this report in accordance with the NIPSO guidance on apology¹.
- NIEA should produce a written review of the decision not to commission an engineer's report on the settlement lagoons' integrity and any risk posed. The written review should have access to all the NIEA materials generated during the complaint along with the complainant's comments. The review's written report and the findings should be provided to this office and the complainant within **six** months of the date of the final report. Any actions recommended should be undertaken by the NIEA within **three** months of the completion of the review report.
- The relevant NIEA officers should be reminded of the need to make proper contemporaneous records of such decisions.
- The relevant NIEA officers should have training in good record keeping.
- DAERA should review the guidance available to staff investigating complaints to ensure there is sufficient emphasis on the need for proper records of the complaint investigation and panel deliberations.

¹ <https://nipso.org.uk/site/wp-content/uploads/2019/07/N14C-A4-NIPSO-Guidance-on-issuing-an-apology-July-2019.pdf>

THE COMPLAINT

1. A complaint was submitted to this office on 27 February 2018 regarding the actions of the Northern Ireland Environment Agency ('NIEA'). The complainant is a Director of River Faughan Anglers Ltd ('RFA') a not for profit organisation incorporated in 1995. RFA seek to 'protect, control and develop fishing on the River Faughan and its tributaries', under a lease granted by the Honourable Irish Society. The River Faughan is designated as an Area of Special Scientific Interest and a Special Area of Conservation. The complaint concerns a specific location on the bank of the River Faughan where a concrete products and associated business is located at Drumahoe.
2. The complainant and RFA have had an interest in environmental issues on the River Faughan for a considerable period. This interest includes raising environmental, planning and legal concerns. Historical planning and legal matters in relation to the planning application are outside the scope of this investigation.
3. NIEA is an Executive Agency within the Department of Agriculture, Environment and Rural Affairs (DAERA) a Northern Ireland executive department. NIEA operates within the context of the DAERA's overall vision, strategic objectives and policies. NIEA's stated primary purpose is to protect and enhance Northern Ireland's environment, and in doing so, deliver health and well-being benefits and support economic growth

Background

4. The complainant wrote to the NIEA on 17 July 2015 regarding ongoing concerns about effluent treatment settlement lagoons and infilling at the Drumahoe site. The Private Secretary of the then DAERA Minister responded to the complainant in a letter dated 19 August 2015 which stated:

'Nevertheless as a final safeguard an independent engineer's report on the lagoons' integrity and any risk posed is being commissioned by NIEA, and this will report in due course.'

5. The complainant subsequently corresponded with the Minister on details of the proposed engineer's report. In a letter dated 28 January 2016 the Minister gave him details of the progressing of the engineer's report and proposed terms of reference. The complainant sought a copy of the engineer's report on 28 August 2016. NIEA responded by letter dated 10 October 2016 that the report had not been progressed, although it did not explicitly state it had effectively been cancelled. The complainant made a complaint on this issue by letter dated 21 October 2016 and progressed the complaint through the DAERA complaints process.
6. The complainant was dissatisfied with the initial response to his complaint in a letter dated 2 December 2016 when the acting Head of Water Management indicated the engineer's report was 'not, ultimately, carried out due to resource pressures' and apologised for the failure to notify the complainant of the change.
7. The complainant pursued his complaint to stage 2 in DAERA's complaints policy by letter dated 10 January 2017. In its response to the stage 2 complaint, by letter dated 9 February 2017, the Director Resource Efficiency Division confirmed that NIEA had made the decision not to progress the engineer's report due to voluntary exit of staff in summer 2015 to spring 2016.
8. The complainant submitted a request for the complaint to progress to Stage 3 by letter dated 2 April 2017. Stage 3 in the DAERA's complaints procedure involves consideration by a panel drawn from outside the business area involved and with independent representation. A final response from the panel was delivered on 8 September 2017. The Permanent Secretary at DAERA responded to the complainant on 7 September 2017.

Issues of complaint

9. The issues of the complaint which were accepted for investigation were:
 1. NIEA handling of a commission for an independent engineer's report it had previously committed to, into the structural integrity of the settlement lagoons at the W&J Chambers Concrete Plant.
 2. NIEA record keeping regarding the issue of the commission for an independent report.
 3. NIEA Complaint handling regarding this matter.
 4. The extent to which NIEA provided clarification on how NIEA envisaged the implementation of conditions 1 and 2 of the planning application.

INVESTIGATION METHODOLOGY

10. In order to investigate the complaint, the Investigating Officer obtained from the NIEA and the Department all relevant documentation together with their comments on the issues raised by the complainant. This documentation included information relating to the three stages of the complaint. As part of the NIPSO investigation process, a draft report was shared with the NIEA and the complainant for comment on factual accuracy and the reasonableness of the findings and recommendations.

Relevant Standards

11. In order to investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case. The general standards are the Ombudsman's Principles :
 - The Principles of Good Administration
 - The Principles of Good Complaints Handling; and
 - The Public Services Ombudsmen Principles for Remedy

These are set out in appendix two to this Report.

12. The standards relevant to this complaint are:
 - (i) DAERA Quality of Service Complaints Procedure 2016 and Staff Guide
 - (ii) Northern Ireland Civil Service Code of Ethics (2013)² and Guidance

13. The Ombudsman's role in this complaint relates to an examination of the administrative actions of NIEA. Section 23 of the Public Services Ombudsman Act (Northern Ireland) 2016 makes clear that 'nothing in this Act authorises the Ombudsman to question the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion'.

14. I have not included all of the information obtained in the course of the investigation in this report. However, I am satisfied that everything that I consider to be relevant to the complaint has been taken into account in reaching findings.

THE INVESTIGATION

15. The complainant sent a letter to NIPSO dated 27 February 2018 in relation to NIEA's responses to his written complaint. He stated that he remained dissatisfied with NIEA's response to his complaint about the handling of the commissioning of an engineer's report at the Drumahoe site. He considered that the ultimate stage 3 complaint response containing an acknowledgement of poor customer service and apology was insufficient. He raised examples of what he felt were continuing 'unacceptable behaviours'; delays; disregard of ministerial authority; and a culture which 'lacks openness, transparency' and 'selective ignorance'.

Issues of Complaint

In reporting on the complaint I have decided to consider issues 1 and 2 together:

² See <https://www.nicscommissioners.org/code-of-ethics.htm>
[https://www.nicscommissioners.org/wp-content/uploads/2013/05/NICS_Code_of_Ethics_Guidance_for_Departments_\(25\).pdf](https://www.nicscommissioners.org/wp-content/uploads/2013/05/NICS_Code_of_Ethics_Guidance_for_Departments_(25).pdf)

1. *NIEA handling of a commission for an independent engineer's report it had previously committed to, into the structural integrity of the settlement lagoons at the W&J Chambers Concrete Plant;*
2. *NIEA record keeping regarding the issue of the commission for an independent report*

Evidence considered

16. I considered the relevant extracts from the documentation regarding the commissioning of the engineer's report set out below. In the submission memo (COR/1616/2015) to the Minister, NIEA officials stated:

'...In addition NIEA has discussed with the site operators the commissioning of a formal engineer's report on the lagoons' integrity and any risk posed, and the operators agreed in principle to commission such a report. However upon consideration by NIEA the judgement was that a report commissioned by NIEA would be more demonstrably independent. This work is expected to begin shortly and we will update you on the findings in due course.'

13 August 2015

17. I considered the letter sent to the complainant by the Private Secretary to the Minister of the Environment which stated:

'...Nevertheless, as a final safeguard an independent engineer's report on the lagoons' integrity and any risk posed is being commissioned by NIEA, and this will report in due course.'

19 August 2015

18. I considered the letter sent by the complainant to the Minister of the Environment which stated:

'...I) Please can you advise if this engineer's report will also look at the stability of the supporting embankment abutting the river, part of which slipped into the river in November 2011

m) *if not, why not given NIEA's recorded concerns over the stability of this part of the site and its acknowledged risk of future landslips in January 2012*

n) *...please can I be provided with the Terms of Reference for the commissioned engineer's report when it is available.'*

23 August 2015

19. I considered the letter sent to the complainant by the then Minister of the Environment, following a further submission memo (COR/1727/2015) which stated:

'...(l) Yes

(m) See the above reply at (l)

(n) This engineer's report is being carried out by civil service engineers and so a tendering process to include formal Terms of Reference is not required. I can however advise that, in broad terms, the report is intended to cover: (i) the current structural integrity of the lagoons; (ii) what risk (if any) there is of the lagoons failing in the absence of outside influence; (iii) what risk (if any) there is of the lagoons failing through an external event such as flooding of the river or erosion; and (iv) what remedial works (if any) are required to remedy any identified deficiencies or risks.'

28 January 2016

20. I considered the letter sent to the complainant by NIEA Water Management Unit, following a request for a copy of the engineer's report which stated:

'...while there was a proposal at that time to commission an engineer's report into these lagoons, this was not, ultimately, carried out due to resource pressures.'

10 October 2016

21. I considered the submission memo (SUB/1394/2016) to the DAERA Minister regarding an initial response to the complaint which stated:

'Given this reduction in staff it became impractical to commission the report into the lagoons at the ...site. In reaching this decision NIEA took into account that the lagoons had never caused any known environmental incident and were

seen as low risk and that carrying out this work would have meant diverting resources away from other much more pressing environmental issues.'

29 November 2016

22. I considered the letter sent to the complainant by the then acting Head of Water Management following the Ministerial submission memo (SUB/1394/2016) which stated:

'These lagoons have been in place for almost twenty years and in all that time NIEA is unaware of a water pollution incident arising from them.

...This report was proposed and agreed internally within NIEA, rather than being ordered by the Minister.

...the Agency's position in respect of resources available to commission such an exercise has changed...

...Water Management Unit had to reprioritise its activities...As part of this prioritisation exercise, NIEA reviewed this case and took the decision not to proceed with the commissioning of an engineer's report...

The Minister has been advised of this.'

2 December 2016

23. I considered the Northern Ireland Civil Service Code of Ethics which provides:

'...

2. As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this Code:

...

- 'honesty' is being truthful and open;*
- 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence; and*

...

3. These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of Ministers, the Assembly, the public and its customers.

...

- *handle information as openly as possible within the legal framework³;*

...

Honesty

7. You must:

- *set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and*

24. I considered the general context of departmental administration by civil servants in relation to matters which form the subject of this complaint. It is a clear and established constitutional principle that civil servants are accountable to Ministers, support Ministers in the exercise of relevant executive functions and do not exercise any statutory authority. It is Ministers who are accountable to the legislature (the Carltona⁴ Principle).

NIEA's response to investigation enquiries

25. During the investigation, the investigating officer directed detailed enquiries to NIEA. In response to these enquiries, NIEA reiterated the position in an email response:

'NIEA would confirm that the decision not to commission an engineer's report was only taken following receipt of further correspondence from the complainant [28 August 2016].

...the actual decision not to proceed was taken in November 2016.

The briefing to the Minister (SUB/1394/2016) on 29 November 2016 is the record of the decision made in November 2016.

...

Weekly catch up meetings were held on Monday mornings ... The meetings were a quick catch up on burring issues and priorities for the week ahead and a

³ I note the NICS Code does not include the additional requirement to keep accurate official records which is found in the equivalent UK code. The omission is not determinative in this matter. The NICS Code is under review by the Department of Finance.

⁴ *Carltona v Commissioner of Works* [1943] Lord Greene MR

'In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them...[therefore] The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. Public business could not be carried on if that were not the case.'

review of what had happened the previous week. The meetings were not formally minuted.'

29 May 2019

Analysis and Findings

26. The record of communications, outlined above, make it clear that DAERA on behalf of NIEA expressly told the complainant, and RFA, that an engineer's report was being commissioned. NIEA also informed the Minister that a report was being undertaken. It is also clear a report was not produced. NIEA have stated that the decision not to commission a report was taken in November 2016. NIEA also told the Minister at that time that the report was not being progressed. NIEA state that the complainant pursuing a copy of the report prompted the decision. The explanation offered by NIEA for not progressing the report concerns the re-prioritisation resulting from staff voluntary redundancies and budget pressures. While it appears straightforward to outline this basic history, I consider that it is not in line with the NICS Code of Ethics and Principles of Good Administration to adopt a 'post facto' narrative account from ongoing correspondence, of an underlying commitment to undertake a technical professional report, without adequate records of how that position was reached.
27. Decision making is a matter for the NIEA officials dealing with this matter. In this investigation I am concerned to note that there are no contemporaneous records available of any analysis, discussions or decisions that took place within NIEA relating to: (i) the decision to propose commissioning the engineer's report; (ii) the terms of reference for the report; (iii) scoping of the staff or financial resources/cost of the report; (iv) substantive contact with civil service technical engineering specialists who could provide the report; (v) project management arrangements for the report; (vi) ongoing management of the proposal to commission the report; (vii) revaluation of the commissioning of the report including competing resources and risks involved; (viii) the decision not to proceed with the report including any consideration of informing the

Minister and properly interested parties No 'file' was produced during this investigation which contained any of the above documentation to outline the history of the handling of the engineer's report. Requests for documentation produced the NIEA email response that the decision was taken in:

'November 2016 because of the correspondence received from the complainant dated 28 August 2016 brought the issue into focus again...The (correspondence) briefing to the Minister is the record of the decision made...not to commission the report.'

29 May 2019

There appears little substantive documentation of action between the initial commitment to engage the engineer's report in August 2015 and the 'decision' in November 2016, not to proceed. Given that the NIEA officials were involved in drafting the letter for the Minister in August 2015 and included the phrase 'final safeguard' it is not unreasonable to expect some documentation on the decision not to proceed beyond a further submission of a second draft letter for the Minister.

28. I refer to the second Principle of Good Administration which requires public bodies to be 'customer focused' which includes keeping to commitments made. In the background of this complaint, NIEA would have been very clear that the complainant and RFA were placing significant reliance on the commissioning of the engineer's report communicated from the Minister's private office. It should have considered updating the complainant on the change of position at a relatively early point. Once made, commitments can be adjusted and changed subject to exigencies. No records of any consideration of the pressures jeopardising the report decision were provided by NIEA.
29. I refer to the third Principle of Good Administration: which requires public bodies to be 'open and accountable' by providing honest evidence based explanations of decisions. This principle underscores the need for records of decisions to be created and maintained. This is a key tenet of good administration. To comply with this principle adequate and contemporaneous records must be retained of matters considered by the public body, decisions made and the reasons for the decisions including weight given to relevant

factors. Records can act as a 'shield' for a public body to defend its actions when challenged. I am concerned that the available evidence of practice within NIEA may justify the description of 'oral government'⁵. I agree with the expressed view of the Information Commissioner:

'It is bad administrative practice not to document what you have done and why. Governments will be hard-pressed to explain their decisions if the reasons for taking them cannot be recalled... Oral government leads to rapid loss of corporate memory. Lessons learned, both good and bad, will be forgotten, meaning errors will be repeated and successes reinvented, in both cases at a cost to the public purse and public good.'

I am satisfied that the identified failures collectively amount to maladministration. I therefore uphold these elements of the complaint relating to lack of communication with the complainant, lack of records concerning the commissioning of the engineer's report, and the subsequent decision not to proceed with this course of action.

30. As a consequence of the maladministration identified I consider the complainant has suffered the injustice of frustration, outrage, anger, uncertainty, as well as the time and trouble in pursuing his complaint to this office.
31. In considering the question of remedy I have taken account of the Principles of Remedy⁶ cited above. I deal with the appropriate remedy in the conclusion of this report.

Issue of Complaint

3. NIEA complaint handling regarding this matter

32. The complainant considered that the NIEA had provided vague responses and inaccurate information during the complaints process, that the process was not

⁵<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/trust-transparency-and-just-in-time-foi-sustainable-governance-and-openness-in-the-digital-age>

⁶ See Appendix two

properly independent, that NIEA 'lacks openness, transparency and exhibited a willingness to deploy selective ignorance to avoid acknowledging poor practice and error'.

Evidence considered

33. I considered the DAERA three stage Complaint Procedure and Guidance, which applied to NIEA as an agency of the Department. I note the following from this Guidance:

4.1 Roles and Responsibilities of Step 1 Customer Service Improvement Managers

Registration and complaint handling process

...

- *In consultation with relevant management, immediately refer the complaint to an appropriate member of staff for investigation.*

[Repeated at 4.2 for Stage 2 complaints]

...

6.3 Stage 3 Senior Management Level

A panel including representation from outside DAERA and Senior Management will be set up...to consider complaints and make representations to the Permanent Secretary. In the case of ...NIEA the respective Chief Executive will chair the panel.

...

- *Minutes must be taken of the meeting and specifically include deliberations and decisions taken by the panel members.*

34. I considered the Northern Ireland Civil Service Code of Ethics which provides: '*...2. As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this Code:*

...

- *'honesty' is being truthful and open;*

- ‘objectivity’ is basing your advice and decisions on rigorous analysis of the evidence; and

...

3. These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of Ministers, the Assembly, the public and its customers.

...

- handle information as openly as possible within the legal framework⁷;

...

Honesty

7. You must:

- set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and

35. The NIEA stage 1 complaint response stated:

‘These lagoons have been in place for almost twenty years and in all that time NIEA is unaware of a water pollution incident arising from them.

...This report was proposed and agreed internally within NIEA, rather than being ordered by the Minister.

...the Agency’s position in respect of resources available to commission such an exercise has changed...

...Water Management Unit had to reprioritise its activities...As part of this prioritisation exercise, NIEA reviewed this case and took the decision not to proceed with the commissioning of an engineer’s report...

I apologise that you were not notified during the spring and early summer of 2016 of the growing likelihood that, due to greatly reducing staff resources and the resultant growing challenges NIEA faced in meeting high priority targets, it might not be possible to justify carrying out this report’

2 December 2016

⁷ I note the NICS Code does not include the additional requirement to keep accurate official records which is found in the equivalent UK code. The omission is not determinative in this matter. The NICS Code is under review by the Department of Finance.

36. In a letter dated 10 January 2017, the complainant raised issues with the accuracy of the assertions in the stage 1 response letter when viewed against: previous correspondence with NIEA and the Minister; Ministerial answers to Assembly questions; and NIEA and departmental information released under the Environmental Information Regulations 2004 including incident reports and regulatory assessments.

37. The NIEA stage 2 complaint response, in a letter from the NIEA Director Resource Efficiency Division, stated:

'Having revisited all of the relevant evidence within your letter, and in light of the ongoing and challenging resource pressures which we currently face, I am content that the potential pollution risk posed by these lagoons is low and that we could not justify prioritising an Engineer's Report in this case.

Once again I would like to apologise that you were not notified sooner that the Engineer's Report was not going to be progressed.'

9 February 2017

38. In a letter dated 2 April 2017, the complainant raised a stage 3 complaint. The letter again raised issues with the accuracy of the assertions in the stage 2 response letter and relied upon material released to him under the Environmental Information Regulations 2004. He also referred to the NICS Code of Ethics

39. The stage 3 panel met on 12 May 2017, 12 June 2017, 6 July 2017 and 24 August 2017. The panel was chaired by the DAERA Director of Corporate Services and included an independent civil servant from The Executive Office.

40. Minutes of the 12 May 2017 stage 3 panel meeting record:

'[Chair] advised that this meeting would be used to review the facts of the case and agree a timeline for responding to the complainant.

The panel papers were reviewed and the issues raised...were discussed.

There were several matters which the panel members felt required further clarification...

It was agreed that a further panel meeting should be convened to discuss the case further, once the additional information has been provided...'

41. In response to queries from the panel the NIEA responded:
'No detailed written records were made of this decision, a fact which the complainant alleges to be an instance of maladministration. NIEA's position is that no such records were kept for many other NIEA projects which had to be shelved or postponed during the same period, as making detailed written records for every shelved project in the face of the halving of staff numbers would in itself have required a considerable, but no longer available, staff resource...'
- 4 July 2017
42. The stage 3 panel findings and recommendations were conveyed to the complainant in a letter from the DAERA Permanent Secretary dated 7 September 2017 to indicate findings on matters raised by the complainant and containing recommendations to address those findings.
43. The stage 3 panel findings were conveyed to the Chief Executive of NIEA by memo from the panel chair dated 8 September 2017.
44. In general terms the panel found that it had been poor customer service not to inform the complainant of the decision not to proceed with the engineer's report on the site. **This element of the complaint was upheld.** Previous apologies were noted and recommendations for future notification of stakeholders were made. **Allegations of a lack of independence at stage 2 were not upheld.** The panel also acknowledged the lack of 'detailed written' records of this decision. I note with some concern that the lack of records was not limited to this case. Recommendations of best practice were made. The panel noted that they were only considering the quality of service within their remit and it does not look at appeals about Departmental decisions nor does it include matters of policy or legislation, which are the direct responsibility of the Minister.
45. In follow up correspondence additional queries from the complainant were

addressed and he was directed to NIPSO if he remained dissatisfied

NIEA's response to investigation enquiries

46. During the investigation, detailed enquiries were directed to NIEA. In response to these enquiries, NIEA reiterated their position:

'Initially in 2015, NIEA discussed internally the merits of carrying out a formal report. The report was intended to reassure rather than address a known high risk...as part of the Ministers response on 19 August 2015 the offer of an engineer's report was put to the complainant... NIEA would confirm that the decision not to commission an engineer's report was only ...NIEA therefore accepts that it subsequently took a decision not to commission an independent engineer's report which it had previously committed to the rationale for which is set out in the response provided above.

20 July 2018

NIEA staff met with Mr Chambers to determine if he would be agreeable to an engineer coming onto his site to undertake this work. The work did not progress any further from that stage.

The relevant documents are:

- 1. A handwritten note of meeting ... on 5 August 2015;*
- 2. An email sent to ... Construction Service dated 17 August 2015; and*
- 3. A site visit by ...on 2 December 2015 to discuss an engineer undertaking a report on the lagoons.*

29 May 2019

Analysis and Findings

47. I consider that the NIEA followed the relevant complaint procedure in broad terms. Any review of the papers will acknowledge that this is a complex and involved matter dating back over a significant period of time.
48. There are no written records of any review of materials or investigation at the stage 2 complaint response outside the written outcome letter. The complaint procedure and guidance refers to an 'investigation'. No documentation of an

'investigation' is available. The Third Principle of Good Complaints Handling requires public bodies to be 'Open and accountable' by providing honest evidence based explanations. The Fourth Principle of Good Complaints Handling requires public bodies to 'Act fairly and proportionately' by ensuring complaints are investigated thoroughly and fairly to establish the facts of the case.

49. There are no contemporaneous records available of any minutes, analysis, discussions or decisions that took place at the stage 3 panel meetings after the first meeting on 12 May 2017. I refer to the second Principle of Good Administration which requires public bodies to be 'customer focused' which includes keeping to commitments made. By failing to record minutes detailing the deliberations and the arrival at a decision the panel failed to follow the complaint procedure and guidance outlined in paragraph 33. Due to the absence of minutes I am unable to discern any deliberation or analysis from the panel on: the issue of independence where the Director who signed the Stage 2 complaint response had been involved in the initial decision-making; and the remedy to be provided. I am unclear as to why a review of the decision not to commission the report was not undertaken. I also note with some concern the admission by NIEA that the lack of records of not proceeding with the engineer's report was not an isolated instance. I deal with this in my recommendations for remedy.
50. I am satisfied that the identified failures collectively amount to maladministration. **I uphold this issue of the complaint.**
51. As a consequence of the maladministration identified I consider the complainant has suffered the injustice of frustration, outrage, anger, uncertainty, as well as the time and trouble in pursuing his complaint to this office.
52. In considering the question of remedy I have taken account of the Principles of Remedy cited above. I deal with the appropriate remedy in the conclusion of this report.

Issue of Complaint

The complainant also raised in his complaint that NIEA had failed to provide sufficient information of the basis for the conditions it had advised to attach to the planning application involving the settlement lagoons.

4. *The extent to which NIEA provided clarification on how NIEA envisaged the implementation of conditions 1 and 2 of the planning application.*

53. The complainant considered that the NIEA had failed to provide an adequate explanation on how it envisaged the planning conditions being implemented. Although there had been an unsuccessful judicial review taken, the complainant contended that the consistent refusal to provide the explanation offended good public administration and raised suspicion as to the motives involved.

Evidence considered

54. NIEA indicated that following the Judicial Review proceedings that the 'NIEA's handling of this site had been proper and lawful' (Background Information to Stage 3 panel 10 May 2017)

55. The stage 3 panel findings and recommendations were conveyed to the complainant in a letter from the DAERA Permanent Secretary dated 7 September 2017 which indicated:

'The Panel can only consider the quality of service you received and therefore, this part of the complaint is outside its remit.'

56. NIEA responded to investigation enquiries by stating

'The Department held the position that the conditions took precedence over the applicant's drawings, the intent behind the conditions was clear and it required a simple alteration of the proposal for them to be implemented. This routinely happens to ensure compliance with conditions. That is to say, that ... the applicant, was legally bound by the conditions and they therefore had to be implemented, irrespective of the drawings.

The Court appears to have accepted this argument, given that it found in favour of the Department on all counts. The conditions imposed were time bound and

the time used by the JR did not complete until after the deadlines had past which resulted in the proposal not being legally undertaken as it would have been in breach of the conditions. To enable the new lagoons to be constructed at that time, the applicant would have been required to submit a new planning application or at least an application to alter the conditions which would have necessitated new environmental assessments including a Habitats Regulations Assessment.

Condition 1 states that the new lagoons shall be constructed and brought into operation within six months of the date of planning approval. The reason for this was, to minimise the potential for pollution incidents on the adjacent River Faughan and Tributaries Special Area of Conservation (SAC) /Area of Special Scientific Interest (ASSI).

Condition 2 states that the existing lagoons shall be decommissioned and removed from the site by 31st October 2013 and all works associated with this operation shall be confined to the period between 1 June and 31 October. The decommissioning and removal of the existing spoil shall be effected from the Glenshane Road side of the development towards the River Faughan and no heavy plant works or spoil storage shall take place within 10m of the banks of the River Faughan. The reason for this was to prevent potential sediment loading of the adjacent River Faughan and Tributaries SAC/ASSI, which may impact on the fish cycle particularly at the most sensitive times of the year.

Both conditions were necessary to ensure the protection of the River Faughan during the construction of the proposed new lagoons, this is clearly stated in the reasons attached to the decision notice. Construction of the new settlement lagoons before decommissioning the existing lagoons ensured no discharge from the concrete facility would enter the SAC/ASSI.'

10 December 2018

[Emphasis Added]

Analysis and Findings

57. I acknowledge that the Ombudsman is not authorised to question the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion.

58. In this instance I consider that the complainant was requesting a more detailed explanation from the NIEA on its role in advising on the conditions. The NIEA position was set out in their response to investigation enquiries at paragraph 56. I am unable to ascertain why the stage 3 panel determined that this matter was outside of their remit because of the lack of any relevant minutes of their analysis or deliberations, as outlined at paragraph 49. I refer to the second Principle of Good Administration which requires public bodies to be 'customer focused' which includes keeping to commitments made. By failing to record minutes detailing the deliberations and the arrival at a decision, the panel failed to follow the complaint procedure and guidance outlined in paragraph 33. Due to the absence of minutes I am unclear as to why an explanation of the rationale for the conditions could not be provided. This is a failure in the complaints handling process. I consider the contents of paragraph 56 as the details which would have been provided.
59. I am satisfied that the identified failures collectively amount to maladministration. **I uphold this part of the complaint.**
60. As a consequence of the maladministration identified I consider the complainant has suffered the injustice of frustration, outrage, anger, uncertainty, as well as the time and trouble in pursuing his complaint to this office.
61. In considering the question of remedy I have taken account of the Principles of Remedy cited above. I deal with the appropriate remedy in the conclusion of this report.

CONCLUSION

62. This complaint was about the actions of the NIEA regarding the commissioning of an engineer's report on settlement lagoons at a concrete works site at Drumahoe.

63. I have investigated the complaint and have found maladministration in relation to the following matters:
- (i) NIEA handling of the commissioning of an engineer's report
 - (ii) NIEA record keeping
 - (iii) NIEA complaint handling
64. I am satisfied that the maladministration I identified caused the complainant to experience the injustice of frustration, anger, uncertainty, as well as the time and trouble in pursuing his complaint to this office.

Recommendations for Remedy

65. Having considered the nature and extent of the injustice sustained by the complainant in consequence of the maladministration identified in this report, I recommend the following remedies:
- The NIEA Chief Executive should apologise for the failings identified in this report in accordance with the NIPSO guidance on apology. I recommend that NIEA provide the apology within **one** month from the date of the final report.
66. I also recommend that NIEA conduct a written review of the decision not to commission the Department of Finance Construction Service or equivalent consultants to carry out, and complete a reassessment of the present position of the settlement lagoons at the Drumahoe site within **six** months of the date of this report. In particular, the written review should consider the structural integrity of the lagoons, their suitability to remain and any risks associated with the position within the flood plain of the River Faughan. NIEA should provide the written review to this office and to the complainant / RFA, and should consider any recommendations or actions to protect the environment in the area that may be judged necessary in light of its conclusions, within **three** months of completion of the review report.
67. In order to improve the NIEA's delivery of its functions, I also recommend that:

- The relevant NIEA officers should be reminded of the need to make proper contemporaneous records. NIEA should reinforce this matter with specific guidance disseminated to staff.
- The relevant NIEA officers should have training in good record keeping.
- DAERA should review the guidance available to staff investigating complaints to ensure there is sufficient emphasis on the need for proper records of the complaint investigation and panel deliberations

68. I recommend that the NIEA implement an action plan to incorporate these recommendations and should provide me with an update within **six** months of the date of the final report. That action plan should be supported by evidence to confirm that appropriate action has been taken (including, where appropriate, records of any relevant meetings, updated policies/guidance, training records and/or self-declaration forms which indicate that staff have read and understood any related policies).

NIEA accepted the findings and recommendations in this report.

PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

4. Acting fairly and proportionately

- Treating people impartially, with respect and courtesy.

- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

5. Putting things right

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

6. Seeking continuous improvement

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.

PRINCIPLES OF GOOD COMPLAINT HANDLING

Good complaint handling by public bodies means:

Getting it right

- Acting in accordance with the law and relevant guidance, and with regard for the rights of those concerned.
- Ensuring that those at the top of the public body provide leadership to support good complaint management and develop an organisational culture that values complaints.
- Having clear governance arrangements, which set out roles and responsibilities, and ensure lessons are learnt from complaints.
- Including complaint management as an integral part of service design.
- Ensuring that staff are equipped and empowered to act decisively to resolve complaints.
- Focusing on the outcomes for the complainant and the public body.
- Signposting to the next stage of the complaints procedure, in the right way and at the right time.

Being Customer focused

- Having clear and simple procedures.
- Ensuring that complainants can easily access the service dealing with complaints, and informing them about advice and advocacy services where appropriate.
- Dealing with complainants promptly and sensitively, bearing in mind their individual circumstances.
- Listening to complainants to understand the complaint and the outcome they are seeking.
- Responding flexibly, including co-ordinating responses with any other bodies involved in the same complaint, where appropriate.

Being open and accountable

- Publishing clear, accurate and complete information about how to complain, and how and when to take complaints further.
- Publishing service standards for handling complaints.

- Providing honest, evidence-based explanations and giving reasons for decisions.
- Keeping full and accurate records.

Acting fairly and proportionately

- Treating the complainant impartially, and without unlawful discrimination or prejudice.
- Ensuring that complaints are investigated thoroughly and fairly to establish the facts of the case.
- Ensuring that decisions are proportionate, appropriate and fair.
- Ensuring that complaints are reviewed by someone not involved in the events leading to the complaint.
- Acting fairly towards staff complained about as well as towards complainants.

Putting things right

- Acknowledging mistakes and apologising where appropriate.
- Providing prompt, appropriate and proportionate remedies.
- Considering all the relevant factors of the case when offering remedies.
- Taking account of any injustice or hardship that results from pursuing the complaint as well as from the original dispute.

Seeking continuous improvement

- Using all feedback and the lessons learnt from complaints to improve service design and delivery.
- Having systems in place to record, analyse and report on the learning from complaints.
- Regularly reviewing the lessons to be learnt from complaints.
- Where appropriate, telling the complainant about the lessons learnt and changes made to services, guidance or policy.