



Northern Ireland

Public Services
Ombudsman

Investigation Report

Investigation of a complaint against Mid and East Antrim Borough Council

NIPSO Reference: 21663

The Northern Ireland Public Services Ombudsman

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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.

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SUMMARY

I received a complaint about the actions of Mid and East Antrim Borough Council (the Council) from an MLA (the complainant). The complainant believed he was not given an opportunity to make representations on behalf of his constituent about a planning application.

I obtained all relevant information including: records from the planning file, relevant information from the Planning NI Portal, and correspondence between the complainant and the Council.

My investigation established that a final decision on the application was not made when the complainant contacted the Council. I was unable to conclude whether the complainant made a request for a meeting.

The investigation established that the Head of Planning gave appropriate consideration to the representations the complainant made to refer the application to the Planning Committee. However, the investigation identified that the Council failed to take proper account of established good practice and keep proper and appropriate records about the application.

I recommended that the Council issue the complainant with an apology. I also recommended that the Council share the learning points from this investigation with relevant staff.

THE COMPLAINT

1. I received a complaint about the actions of Mid and East Antrim Borough Council (the Council) from an MLA of the Northern Ireland Assembly (the complainant). The complaint concerns the Council's consideration of representations the complainant made on behalf of a constituent (the applicant) in respect of a planning application. The complainant said that on 8 November 2018 he requested the application be held and referred to the Planning Committee, or until he met with the Council to discuss the issue. The complainant said that a meeting was not facilitated and the Council told him there was no mechanism to refer the application to the Planning Committee. The planning application was refused. The complainant believed he suffered the injustice of being unable to represent his constituent.

Issue of complaint

2. The issue of complaint accepted for investigation was:

Was the Council's engagement with the complainant as a public representative in relation to the planning application appropriate and in accordance with relevant policies and procedures?

INVESTIGATION METHODOLOGY

3. In order to investigate this complaint, the Investigating Officer obtained from the Council all relevant documentation together with its comments on the issues raised by the complainant. The Investigating Officer also interviewed a Principal Planner and the Case Officer who dealt with the application as part of the investigation.

Relevant Standards and Guidance

4. 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. I also make reference to relevant regulatory, professional and statutory guidance.

The general standards are the Ombudsman's Principles¹:

- The Principles of Good Administration,
- The Public Services Ombudsmen Principles for Remedy.

5. The specific standards and guidance referred to are those which applied at the time the events occurred. These governed the exercise of the administrative functions of those individuals whose actions are the subject of this complaint.

The specific standards and guidance relevant to this complaint are:

- Annex D, Scheme of Delegation, Mid and East Antrim Council Constitution (the Scheme of Delegation);
- Development Management Practice Note, Practice Note 15, Councils Schemes of Delegation, 2015 (the Practice Note).

6. In investigating a complaint of maladministration, my role is concerned primarily with an examination of the administrative actions of the Council. It is not my role to question the merits of a discretionary decision taken unless that decision was attended by maladministration.

7. A draft copy of this report was shared with the complainant and the Council for comment on factual accuracy and the reasonableness of the findings and recommendations.

8. I did not include all of the information obtained in the course of the investigation in this report but I am satisfied that everything that I consider to be relevant and important was taken into account in reaching my findings.

¹ These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

THE INVESTIGATION

Was the Council's engagement with the complainant as a public representative in relation to planning the application appropriate and in accordance with relevant policies and procedures?

Detail of Complaint

9. The applicant submitted a planning application on 15 December 2017 for the removal/variation of condition 6 of a planning application previously approved on 3 August 2017. The approved planning application concerned the development of a poultry house for 16,000 birds.
10. The complainant said that on 8 November 2018 he met with the applicant and his agent to discuss the application. He said that he telephoned the Head of Planning at this time but was informed he was at a meeting. The complainant said that after their meeting, at 1500 hours, the agent called in person to the Planning Office to request that the application be held. He said that the agent spoke with the Case Officer who informed him that although the application was not yet written up or processed there was no guarantee it could be held.
11. The agent emailed the Principal Planner at 1611 hours. He said *'We believe that there are further issues which remain to be explored regarding this application and would respectfully request that the decision be withheld until these can be examined. I called in person with the case officer this afternoon and requested the decision be held until such time as we have had the opportunity to discuss this application further with [the Head of Planning]'*.
12. The complainant said that he spoke to the Head of Planning on 9 November 2018 by telephone. He said that he requested the decision on the application be held and asked that it be referred to the Planning Committee *'or at least until [he] was afforded an office meeting with [the Head of Planning] to discuss'*. The complainant said that the Head of Planning told him he would look into the matter and respond to him.

13. The complainant said that he received an email from the Head of Planning on 12 November 2018 *'indicating there was no mechanism for referral to the [Planning Committee] and claiming the refusal notice had already been "generated"'*. The complainant believed he was not provided with an opportunity to make representations on behalf of his constituent about the planning application.

Evidence Considered

Legislation/Policies/Guidance

14. I considered the following policies and guidance:

- the Scheme of Delegation; and
- the Practice Note.

Comments on draft report

15. The Council accepted my findings and recommendations. The complainant said he was content with the report.

The Council's response to investigation enquiries

16. The Council explained that the Head of Planning returned the complainant's phone call on 8 November 2018 and agreed to consider his request that the application be referred to the Planning Committee. The Council said that the complainant did not request a meeting with the Head of Planning during the call.
17. The Council said that *'The decision notice refusing planning permission had already been generated prior to [the complainant's] phone call. The matter was [then] discussed with the Director and Corporate Solicitor. Given that the application fell within the Scheme of Delegation, there was no justification to*

refer it to the Planning Committee. The complainant was advised accordingly by email on 12 November 2018.'

18. The Council said that the Head of Planning became aware of the agent's request for a meeting in an email he received on 9 November 2018. The Council explained that *'Given that the [planning] decision had already issued and no request for a meeting was ever made directly to [the Head of Planning] it is not appropriate nor custom and practice to re-consider a decision that has been made in accordance with Planning legislation and policy. There is no legal basis for Planning Officers to reconsider decisions once issued.'*
19. The Council confirmed that a decision is final when it is signed by an Authorised Officer nominated by the Head of Planning under the Scheme of Delegation. The Council further explained that *'In accordance with the Planning legislation and Policy the only person authorised to amend/change the decision of a planning officer or the Planning Committee is the High Court or the Planning Appeals Commission.'*
20. In response to enquiries, the Council explained that there are no specific policies or procedures for dealing with enquiries or representations from MLAs about planning matters, and *'each request will be dealt with on its own merits'* The Council also said that there is no specific policy or procedures on who may make representations on planning applications.
21. The Council said that *'It has always been and continues to be the case that in the event a member of the public requested a meeting to discuss a planning application this would be granted so long as sufficient resources are in place to do so, as all the information is available on the Planning Portal. Furthermore often than not...a telephone conversation resolves queries and meetings are not required. The Planning legislation and policy do not create any legal requirement for applicant agents/local representatives or members of the public the right to have a face to face meeting with the planning officer/s. We do however offer face to face meetings where there is a clear need to do so depending on the nature of the application.'*

Interviews

Interview with Case Officer

22. The Investigating Officer asked about the process for refusing or approving planning applications. The Case Officer said that she produces a Development Management Officer Report (DMO report)² and discusses this with the Authorised Officer who then approves the report by signing it. The Case Officer then generates a Decision Notice and puts this on the Authorised Officer's desk for signing. She said a Decision Notice cannot be generated until the report is '*signed off*' by an Authorised Officer.
23. The Case Officer said that she may have spoken to the applicant's agent on 8 November 2018 but could not recall him visiting the Planning Office or any discussion with him on that day. She said she believed she would have made a record if a discussion took place.
24. The Investigating Officer asked the Case Officer why she had contacted the Northern Ireland Environment Agency (NIEA) on 9 November 2018, the day after the Decision Notice was issued. She said she could not recall why she had contacted NIEA. She said she assumed she had been asked to do this but could not recall why.
25. The Investigating Officer asked the Case Officer why the DMO report appeared to have been re-dated 9 November 2018. She said she did not know why the DMO report had been re-dated.

Interview with Principal Planner

26. The Principal Planner was asked about the decision making process for refusing or approving a delegated planning application. He said that a '*group decision*' is taken by the Case Officer and an Authorised Officer to approve or reject it, and the Authorised Officer would then '*sign it off*' in the DMO report.

² A DMO report is prepared by Case Officers on planning applications setting out information about the site and area, a description of the proposal, policy and other material considerations and recommendations.

27. The Principal Planner explained that a Decision Notice is then generated by pressing a button on the Planning IT System and printing off the notice. He said that the printed notice is issued when it is signed by an Authorised Officer.
28. The Principal Planner said that in his view a decision on a planning application becomes final when the notice is issued. He said that a generated notice could be withdrawn or held if required, as long as it had not been issued.
29. He said that he is aware that the Head of Planning discussed the application with others before instructing him to issue the Decision Notice rejecting the application.
30. The Principal Planner said that he is unaware of a discussion between the Case Officer and the agent on 8 November 2018. However, he confirmed that the agent sent him an email that day in respect of the planning application. He said that he believed he would have discussed the email with the Head of Planning but cannot recall the conversation.
31. The Investigating Officer asked the Principal Planner why he dated the Decision Notice 8 November 2018 but dated the DMO report 9 November 2018. He said that he had no recollection of signing the DMO report. However, he agreed with a suggestion from the Investigating Officer that he may have re-dated the DMO report to reflect that he made the final decision on that date after discussing it with the Head of Planning.
32. The Principal Planner was asked why the Case Officer sent an email to the NIEA on 9 November 2018, the day after the decision was issued. He said it was not unusual for further information to be put on file after a Decision Notice was issued.

Relevant Council Records

33. I considered all relevant Council records, including:
 - records from the planning file;

- relevant information from the Planning NI Portal; and
 - correspondence between the complainant and the Council.
34. A chronology of relevant contact from the Council, the complainant and the agent about the planning application is enclosed at Appendix three.
35. The Head of Planning made a file note of a telephone conversation with the complainant dated 8 November 2018. It records that the complainant *'requested that the planning application be referred to the Planning Committee. He [the complainant] was amazed that MEA [the Council] had no call in powers and would question the legality of that...I agreed to look into the matter and get back to him'*.
36. The records contain another file note from the Head of Planning, dated 8 November 2018, about the complainant's request that the planning application be referred to the Planning Committee. It documents that *'The Case Officer had already generated the decision notice prior to [the complainant's] call. I discussed the matter with the Director [of Development] and Corporate Solicitor. The consensus view was that if the application fell within the Scheme of Delegation, that it shall not be referred to the Planning Committee, but processed in line with the agreed Scheme of Delegation. Given that MLAs do not have call in powers there is no reason to refer the application to the Planning Committee. I advised PPTO³ to issue the decision notice'*.
37. The DMO report recorded that *'the application will be issued as a refusal'*. It was signed and dated 8 November 2018 by the Case Officer and the Principal Planner. The date entry made by the Principal Planner was then changed to 9 November 2018. The Principal Planner made a note on the DMO report *'Refuse as per this report. Key consideration is consultation response from NIEA and European Judgement. No objections'*.
38. The records document that on 9 November 2018 the Case Officer telephoned

³ The Principal Planner.

NIEA to ask whether they had any further comment to make on the application. She also emailed NIEA on this date asking whether it would concur with Shared Environmental Services (SES) view that *'the proposal would be likely to contribute cumulatively to an adverse effect on the site integrity of the SAC'*.

NIEA responded on 9 November 2018 that *'The Council who are the "competent authority" in these cases are required by law to recommend refusal if impacts on designated sites cannot be discounted'*. NIEA also provided the Council with a copy of a relevant judgement of the Court of Justice of the European Union. The Case Officer informed the Head of Planning of NIEA's response on 9 November 2018.

39. On 12 November 2018, the Head of Planning sent an email to the complainant informing him that the application *'is not a mandatory application for the determination of the Planning Committee'*. The email also said that *'The application falls within the delegated category of applications which can be determined by Planning Officers. It would therefore not be appropriate for this application to go to the Planning Committee. Further following your telephone call last week and upon checking the file the decision notice had already been generated and the applicant should have received the decision notice'*.

Analysis and Findings

40. I note that the Council said that the telephone call with the complainant took place on 8 November 2018 while the complainant believed the conversation happened on 9 November 2018. I note that the Head of Planning made two files notes dated 8 November 2018 recording the nature of the telephone call and his subsequent consideration of the complainant's request to refer the application to the Planning Committee. I also note that the complainant provided no evidence that the call took place on 9 November 2018. I therefore consider, on balance, the telephone call happened on 8 November 2018.
41. I note that the telephone call of 8 November 2018 was the first contact between the Council and the complainant about the planning application. I also note there was significant contact between the applicant's agent and the Council

between June and October 2018 in respect of the application.

42. I note that the Council has no specific policies or procedures setting out how to deal with representations from MLAs. I note the Council said that *'in the event a member of the public requested a meeting to discuss a planning application this would be granted so long as sufficient resources are in place to do so.'*, I also note the Practice Note states that *'It is crucial in the determination of any application that representations on applications are fully considered before determination of the application...It is imperative therefore that representations are brought to the attention of the relevant officer as soon as possible to ensure they are given due consideration before a decision is made.'*
43. I note that the complainant said he requested a meeting during the telephone call with the Head of Planning to discuss the application. I also note that the Head of Planning said a meeting was not requested, and his file note of the conversation makes no reference to same. In the absence of any additional evidence, I am unable to conclude whether a request for a meeting was made at this time.
44. I note that both the complainant and the Head of Planning said that a request was made during the telephone call to refer the application to the Planning Committee. I note that the file note of 8 November 2018 by the Head of Planning recorded that following this call he *'discussed the matter with the Director [of Development] and Corporate Solicitor. The consensus view was that if the application fell within the Scheme of Delegation, that it shall not be referred to the Planning Committee, but processed in line with the agreed Scheme of Delegation. Given that MLAs do not have call in powers there is no reason to refer the application to the Planning Committee. I advised PPTO⁴ to issue the decision notice'*.
45. I consider that a final decision on the application was not made when the complainant requested the application be referred to the Planning Committee. I note that this is evidenced in the file note where the Head of Planning set out

⁴ The Principal Planner.

his rationale for not agreeing to the request.

46. I considered the 'call in powers' referred to in the Head of Planning's note of 8 November 2018. I note that the Head of Planning identified that these powers did not extend to MLAs and therefore the complainant was not in a position to 'call-in' the application to the Planning Committee.
47. I note the content of Part B of the Council's Scheme of Delegation which sets out when a planning application should be referred to the Planning Committee for decision. In particular, I note that the Head of Planning can refer an application to the Committee where he '*considers that the proposal merits consideration*' by same. I note that in this particular case the Head of Planning considered the complainant's request to refer the application, but decided that the application did not merit consideration by the Committee as it fell within the Scheme of Delegation. I consider that this was a discretionary decision taken by the Head of Planning in accordance with the Scheme of Delegation.
48. Overall, after considering the available evidence, I am satisfied that the Head of Planning did give appropriate consideration to representations made by the complainant, despite them being made on the date the decision notice was generated and issued. I did not identify any maladministration in relation to the Council's consideration of same and therefore I do not have any grounds to question the merits of the discretionary decision. Therefore I do not uphold this element of the complaint.
49. I note the Case Officer could not recall whether the applicant's agent spoke to her to request a meeting on 8 November 2018. However, I note an email from the agent to the Principal Planner later that day refers to him making such a request to the Case Officer. I therefore consider that on balance, a request for a meeting was made to the Case Officer. I note that the Case Officer did not make a record of this conversation.
50. The third Principle of Good Administration 'Being Open and Accountable' requires public bodies to keep proper and appropriate records. I consider the Council failed to act in accordance with this Principle by not making a record of

the agent's request for a meeting or give consideration to this request. I consider this constitutes maladministration. However, I did not identify any injustice as a result of this maladministration.

51. I note that the DMO report was approved on 8 November 2018 and a Decision Notice refusing the planning application was issued the same day. I also note that on 9 November 2018 the Council made further enquiries with NIEA about the application. I consider that the Principal Planner then re-dated the DMO report 9 November 2018 and provided a rationale for the decision based on the information NIEA provided. I consider that if the Council considered the information from NIEA was necessary then enquiries about the application should have been undertaken prior to the decision on the application being made. I note that in this case, additional enquiries took place after the decision was made. The response from NIEA does not appear to have raised any issue about the merits of the decision taken by the Council. However, I am concerned as to what action the Council could have taken if this had not been the case, given that the Council has indicated once the decision was issued the only way to challenge it was via the Planning Appeals Commission or the High Court.
52. The first Principle of Good Administration 'Getting it Right' requires public bodies to take proper account of established good practice. I consider that by changing the DMO report on 9 November 2018, the Council failed to meet the standards required by the first Principle. I also consider that this failure was contrary to the fourth Principle of Good Administration 'Acting Fairly and Proportionately' which states that public bodies should ensure that actions and decisions taken are appropriate. I consider this failure constitutes maladministration.
53. I am satisfied that as a consequence of the maladministration identified, the complainant experienced the injustice of frustration and uncertainty. This injustice is not as a result of the decision to refuse the application, but because of the doubt the maladministration created about the process.

CONCLUSION

54. The complainant raised concerns about the Council's consideration of representations he made on behalf of a constituent about a planning application. The complainant said that on 8 November 2018 he requested the application be held and referred to the Planning Committee or until he met with the Council to discuss same. The complainant said that a meeting was not facilitated and the Council told him there was no mechanism to refer the application to the Planning Committee. The planning application was refused. The complainant believed he suffered the injustice of being unable to represent his constituent.
55. On investigation of the complaint, I found that that a final decision on the application was not made when the complainant contacted the Council. I was unable to conclude whether a request for a meeting was made by the complainant.
56. I found the Head of Planning gave appropriate consideration to the representations made by the complainant to refer the application to the Planning Committee. I therefore did not identify any maladministration in respect of this issue.
57. However, I found maladministration relating to the Council's failure to:
- i. Keep proper and appropriate records of the agent's request for a meeting;
 - ii. Take proper account of established good practice;
 - iii. Ensure that all actions and decisions taken were appropriate.
58. I am satisfied that the maladministration I identified caused the complainant to experience the injustice of frustration and uncertainty.

Recommendations

59. I recommend that the Council provides the complainant with a written apology in accordance with NIPSO 'Guidance on issuing an apology' (June 2016), for the injustice caused as a result of the maladministration identified within **one month** of the date of this report.

60. I also recommend that the Council share the learning points from this investigation with relevant staff within **one month** of the date of this report.

61. The Council should consider developing a formal policy about the role of public representatives in the planning process.

A handwritten signature in black ink that reads "Margaret Kelly". The signature is written in a cursive style with a horizontal line under the name.

MARGARET KELLY
Ombudsman

January 2021

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.

