The Upper Tribunal
(Administrative Appeals Chamber)

UT NCN: [2025] UKUT 198 (AAC)
UT Case Number: UA-2023-001905-GIA

Summary: Freedom of Information (93.4: Freedom of information – absolute exemptions)

Freedom of Information Act 2000 – section 44(1)(a) – section 63 of the Police (Northern Ireland) Act 1998 – disclosure of the information in question was not prohibited by section 63.

Before

UPPER TRIBUNAL JUDGE JACOBS

Between

Police Ombudsman for Northern Ireland	**Appellant**
v	
Information Commissioner	**First Respondent**
Mark Rainey	**Second Respondent**

Decided on 21 August 2025 following an oral hearing on 17 July 2024

Representatives

Police Ombudsman:	Simon McKay of counsel, instructed by Ombudsman's Legal Directorate
Information Commissioner:	Antonia Fitzpatrick of counsel, instructed by the Commissioner's Legal Department
Mark Rainey	Spoke on his own behalf

DECISION OF UPPER TRIBUNAL

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: EA-2023-0218
Decision date: 26 October 2023
Hearing: Remote

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

CONTENTS

Abbreviations:

1998 Act: Police (Northern Ireland) Act 1998

FOIA: Freedom of Information Act 2000

Ombudsman: Police Ombudsman for Northern Ireland

A. What this case is about

1. This is one of two cases before the Upper Tribunal that arise from Mr Rainey's request for information from the Ombudsman. The Ombudsman relied on the exemptions in FOIA sections 30 and 44.

2. Both cases relate to the Ombudsman's second report into the Loughinisland Massacre of 1994, when gunmen killed and wounded customers at a public house that was known to be frequented by Catholics. There were suspicions that there had been collusion between the attackers and the security services. At the request of the victims' families, the Ombudsman at the time investigated the conduct of the police. This led in 2011 to the Ombudsman's first report, which found no evidence of collusion. A new investigation was carried out under that Ombudsman's successor. This led in 2016 to the second report, which found that there had been collusion and that the police investigation was undermined by their concern to protect informers. Subsequently, documentaries were made, one of which was *No Stone Unturned*.

3. This is the Ombudsman's appeal to the Upper Tribunal on section 44, which is an absolute exemption under FOIA. The First-tier Tribunal dealt with the section 44(1)(a) exemption in October 2023. The Ombudsman argued that disclosure of the information requested was 'prohibited by or under any enactment'. The tribunal rejected that argument. The Ombudsman's appeal came before the Upper Tribunal under reference *UA-2023-001905-GIA*. I held an oral hearing of the appeal on 17 July 2024. The First-tier Tribunal was due to deal with the section 30 exemption a few days

later. In the circumstances, I decided to wait before making a decision on section 44 to allow time for any appeal to the Upper Tribunal on section 30. I have now made my decision, which will be published as *Police Ombudsman for Northern Ireland v Information Commissioner and Rainey (section 44 FOIA)* [2025] UKUT 198 (AAC).

4. The other case is Upper Tribunal reference *UA-2024-001304-GIA* and concerns section 30, which is a qualified exemption under FOIA. The First-tier Tribunal heard the appeal in July 2024. I gave the Ombudsman permission to appeal to the Upper Tribunal and held an oral hearing on 30 April 2025. The decision will be published as *Police Ombudsman for Northern Ireland v Information Commissioner and Rainey (section 30 FOIA)* [2025] UKUT 199 (AAC).

B. What this case is not about

5. This case is only about the exemption in section 44(1)(a). It is not about the exception in section 30, which is the subject of the companion case. Nor is it about any other exemptions, whether absolute or qualified, that might cover information held by the Ombudsman.

C. Legislation

FOIA

6. These are the relevant provisions:

> **1 General right of access to information held by public authorities.**
>
> (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.
>
> **2 Effect of the exemptions in Part II.**
>
> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply.
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

…

(g) section 41, and

(h) section 44.

41 Information provided in confidence.

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

44 Prohibition on disclosure.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any assimilated obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Police (Northern Ireland) Act 1998

7. These are the relevant provisions:

51 The Police Ombudsman for Northern Ireland.

(1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.

(2) The person for the time being holding the office of Police Ombudsman for Northern Ireland shall by that name be a corporation sole.

(3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland (in this Part referred to as ‘the Ombudsman’).

(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure—

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

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

(5) The Independent Commission for Police Complaints for Northern Ireland is hereby abolished.

62 Statements by Ombudsman about exercise of his functions.

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

63 Restriction on disclosure of information.

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

(a) to a person to whom this subsection applies;

(b) to the Department of Justice or the Secretary of State;

(c) to other persons in or in connection with the exercise of any function of the Ombudsman;

(d) for the purposes of any criminal, civil or disciplinary proceedings; or

(e) in the form of a summary or other general statement made by the Ombudsman which—

(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to—

(a) the Ombudsman; and

(b) an officer of the Ombudsman.

(2A) Subsection (1) does not prevent the Ombudsman, to such extent as he thinks it necessary to do so in the public interest, from disclosing in a report of an investigation under section 60A—

(a) the identity of an individual, or

(b) information from which the identity of an individual may be established.

(3) Any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Nothing in subsection (1)(b) permits the disclosure to the Department of Justice of information—

(a) which has been supplied to the Ombudsman under section 66(1) of the Police (Northern Ireland) Act 2000 for the purposes of or in connection with an investigation under section 60A of this Act, and

(b) in relation to which the Ombudsman has been informed under section 66(3)(b) of the Police (Northern Ireland) Act 2000 that the information is, in the opinion of the Chief Constable or the Board, information which ought not to be disclosed on the ground mentioned in section 76A(1)(a) of that Act.

D. The First-tier Tribunal's reasoning

8. This was the tribunal's reasoning on section 44:

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

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

83. The text of a provision, as it would be reasonably understood, is the starting point, but the text should be read in the context of the Act as a whole and in its legal, social and historical context. The statutory context is set out above, under 'Statutory and factual background to the appeal' and in the open annex.

84. The proposal for an independent Ombudsman arose, in part, out of issues with public confidence in the existing police complaints system and the need for it to be seen to be properly independent from the police force. The function of the Ombudsman is to investigate and prepare reports on complaints about the conduct of a member of the police force made by, or on behalf of the public and to conduct formal investigations of her own motion in relation to the conduct of members of the police force in certain circumstances.

85. After investigation the Ombudsman can, depending on the circumstances, refer the matter to the Director of Public Prosecutions ('DPP'), determine that the matter is suitable for resolution by mediation or recommend or direct disciplinary proceedings.

86. The Ombudsman also has the power to investigate a current practice or policy if she has reason to believe that it would be in the public interest to do so.

87. Finally, under section 62 the Ombudsman 'may, in relation to any exercise of [her] functions under this Part, publish a statement as to her actions, her decisions and determinations and the reasons for her decisions and determinations.'

88. According to the Ombudsman's Review under Section 61(4) of the Police (Northern Ireland) Act 1998 dated 6 November 2020 ('the five-year review'): 'The Ombudsman uses this provision to publish significant public statements on historical and current investigations as well as the publication of cases studies in annual and thematic reports and in press articles'. (para 1.9).

89. The Ombudsman has two investigations directorates – the Current and Historical Investigations Directorates. The Historical Investigations Directorate 'investigates grave or exceptional matters relating to the actions of police officers during the conflict in Northern Ireland between 1968 and 1998 (commonly known as 'The Troubles')'

90. Under section 51(4) the Ombudsman is required to ('shall') exercise her powers 'in such manner and to such extent as appears to her to be best

calculated to secure' the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and of members of the police force in that system.

91. The relevant social and historical context in Northern Ireland includes a long history of sectarian violence and a sharply divided society. This means that 'the public' and 'members of the police force' will include people with different sectional community interests. As Mr McKay put it, under section 51(4) it is for the Ombudsman to decide the manner in which she exercise her powers to secure the confidence of two opposing groups of the public in a divisive environment.

92. It is in this context that section 63 must be construed. We note that section 63 contains the word 'received' and the phrase 'in connection with any of the functions' of the Ombudsman. Both of these operate to limit the scope of the section. The section could have been drafted more widely to apply to all information 'held' by the Ombudsman in connection with any of her functions. It could have been drafted to apply to all information received by the Ombudsman, or all information held by the Ombudsman. Given that the provision is penal, it is not surprising that it was not so widely drafted.

93. We do not accept that the section is intended to cover any information *held* by the Ombudsman the disclosure of which would run the risk of revealing the identity of persons who could be targeted by terrorists or could lead to the 'jigsawing' of different strands of information to achieve that purpose. That is not the provision that has been enacted.

94. The legislature has chosen to use the word 'received' to provide a boundary to the information covered by section 63. In the light of the context above, the legislature must have chosen the word 'received' because its intention was to ensure the confidentiality of information provided to the Ombudsman *by a third party*.

95. This is particularly important in the social and historical context because (a) there must be public confidence in the Ombudsman and (b) there are real risks to the personal safety of those making complaints and those named in complaints or those who could be identified by terrorists piecing together information. Making section 63 subject to a criminal penalty is intended to give confidence to the public and to those making complaints and ensures that the Ombudsman can carry out her investigative functions effectively in the specific circumstances in Northern Ireland.

96. In our view, the meaning of 'received' contended for by the Commissioner conveys the intention that we attribute to the legislature. 'Received' clearly covers information sent to the Ombudsman by a third party. If the Ombudsman generates information that includes or is drawn from information provided by a third party, we consider that this is also information 'received'. The section applies to information, not documents, and we think that the information contained in such a document would still have been received from a third party. The information comes from an external source. Disclosing it would undermine the purpose of the section, because the confidentiality of information provided by those making complaints would be undermined.

97. We do not accept that the word 'received' can bear the meaning contended for by the Ombudsman. Information that would not have existed 'but for' information received from a third party may not contain or even refer to information provided by a third party. It has not come from a third party and so its disclosure would not undermine the confidentiality of information provided by those making complaints.

98. We have not found the presumption against doubtful penalisation to be of particular assistance in this case. First, we note the reservations expressed in another context by the Upper Tribunal in *Gordon v Information Commissioner and HMRC* [2020] UKUT 92 (AAC) at paragraph 25:

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

99. That appeal concerned a statutory prohibition contained in the Commissioners for Revenue and Customs Act 2005 (CRCA). Although the route to the statutory prohibition in the CRCA is fairly tortuous and the penal provision only comes in indirectly, in our view the two points made by Upper Tribunal Judge Jacobs remain valid: FOIA does not involve a penal element and the presumption is just a presumption.

100. Second, we do not accept that the Commissioner's contended interpretation is unclear, and therefore it does not, in our view, offend against the presumption of doubtful penalisation. In our view the presumption, if it assists at all, points to the Commissioner's interpretation being the correct one. The presumption is based on the need to warn people of potentially adverse consequences of their actions. We do not accept that section 63 gives a fair warning that it would be a crime to disclose information that would not have existed *but for* some information received from a third party.

101. In our view, the wide construction of section 63 contended for by the Ombudsman would be unworkable and is uncertain. It would cover vast quantities of information held by the Ombudsman, and it may be difficult to identify from a document itself whether or not it would have existed 'but for' information received by the Ombudsman.

102. For those reasons we do not accept that information falls within the scope of section 63 if it is generated by the Ombudsman unless it includes or is drawn from information provided to the Ombudsman by another party.

103. We note that our conclusions above appear to accord with the Ombudsman's publicly expressed understanding of section 63. In her five-year review, the Ombudsman says the following about section 63:

> The Ombudsman and her staff are prohibited from disclosing information obtained for the purposes of her functions except for certain statutory purposes including the purposes of any civil, criminal or disciplinary proceedings. Any person who discloses this information is guilty of a criminal offence. (para 1.10)

104. In the context of amendments that would be needed to accommodate any new information sharing arrangements with other bodies such as other police oversight bodies and ombudsmen, the Ombudsman stated:

> Section 63 of the 1998 Act prohibits the Ombudsman and her staff from disclosing any information obtained for the purposes of any of her statutory functions with certain exceptions for certain purposes. These include for the purposes of any civil, criminal or disciplinary proceedings. The operation of this statutory bar is important to protect the confidentiality of the information provided to the Ombudsman by any other party. (para 4.30)

105. Those extracts from the five-year review suggest that the Ombudsman's view of the meaning and purpose of section 63 accords with the tribunal's view. It applies to information 'obtained' by the Ombudsman. It is aimed at protecting the confidentially of information 'provided to the Ombudsman by any other party'.

106. Applying the definition of 'received' set out above, we have concluded that some of the information in the closed bundle does not fall within the scope of section 63 and is not exempt under section 44. The specific pages are identified in the closed annex to this decision.

107. Not all information received by the Ombudsman will fall within section 63. The information must have been received 'in connection with' any of the functions of the Ombudsman. In our view the information does not in itself have to have any connection with a function. On an ordinary reading of section 63 we find that the phrase 'in connection with any of the functions' qualifies 'received' not 'information'.

108. The words 'in connection with' can have a broad or narrow meaning in literal terms. We have gained some assistance from the Court of Appeal's discussion of the meaning of this phrase in other contexts in *London Luton v HMRC* [2023] EWCA Civ 362.

109. The Court of Appeal referred to the House of Lords in *Coventry Waste and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer) ('Coventry Waste')* [1999] 1 WLR 2093 in which Lord Hope said as follows:

> It may be that in some contexts the substitution of the words 'having to do with' will solve the entire problem which is created by the use of the words 'in connection with.' But I am not, with respect, satisfied that it does so in this case, and Mr Holgate [Counsel for the Valuation Officer] did not rely on this solution to the difficulty. As he said, the phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the

> [1989 Order] and its wider context, which provide the best guide to a sensible solution of the problem which has been created by the ambiguity.

110. The Court of Appeal said the following at paragraphs 63 – 69 about the phrase 'in connection with':

> 63. *Coventry Waste* therefore stands for the proposition that the words will usually take their meaning from those which surround it and the wider context, and that courts and tribunals may have to determine whether the words have a broad or a narrow meaning, understood in context. In literal terms, both meanings are possible.
>
> 64. In *Barclays Bank plc & Trustees of the Barclays Bank Pension Fund v HMRC* [2007] EWCA Civ 442, [2008] STC 476 ('Barclays'), Arden LJ observed that the words 'in connection with past service', which appeared in s.612(1) of the Income and Corporation Taxes Act 1988, could describe a 'range of links' (see [18]). This fits with Coventry Waste (to which Arden LJ referred) in suggesting that different meanings are possible. Arden LJ also referred at [19] to the need to examine the function or purpose of the legislation, and at [30] to the purpose of the legislation potentially informing the court's thinking where there is a choice of meaning.
>
> 65. *Herons Court v Heronslea* [2019] EWCA Civ 1423, [2019] 1 WLR 5849 is a decision of the Court of Appeal which was not cited to us but provides a useful illustration of the principles discussed in Coventry Waste and Barclays. It concerned s.1(1) of the Defective Premises Act 1972 which provided that 'a person taking on work for or in connection with the provision of a dwelling … owes a duty to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner…'. The issue was whether an approved inspector owed such a duty. Hamblen LJ decided that the approved inspector did not owe such a duty under the statute:
>
> > 38. In the present case the context includes the whole of section 1(1), not just the words: 'A person taking on work for or in connection with the provision of a dwelling …'. This includes that the duty relates to how 'the work which he takes on is done' and that it is done 'with proper materials'. The focus is therefore very much on the doing of work.
> >
> > 39. That work also has to relate to the 'provision of a dwelling'. This suggests the bringing of that dwelling into physical existence or its creation. This is consistent with how these words have been interpreted in other cases. For example, *Jacobs v Morton* (1994) 72 BLR 92, 105: 'In my judgment, this phrase connotes the creation of a new dwelling' per Mr Recorder Jackson QC; *Saigol v Cranley Mansions Ltd* (unreported) 6 July 1995; [1995] CA Transcript No 658: 'Mr Ticciati was in my view correct in submitting the 'provision' was a word which prima facie involved the creation of something new', per Hutchison LJ.
> >
> > 40. The emphasis is therefore on those who do work which positively contributes to the creation of the dwelling. That may include architects and engineers who prescribe how the dwelling is to be created, not just those who physically create it. It does not, however, include those

> whose role is the essentially negative one of seeing that no work is done which contravenes building regulations. Building control ensures that the dwelling is legal and properly certified, but it does not positively contribute to the provision or creation of that dwelling.

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

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

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

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

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

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

> In my view the actual words of the statute are capable of bearing either construction according to the context in which they are used, but, at the end of the day, I agree with the judgment of Brightman J and the view of the Special Commissioners that in the context of s41(1) of the

> 1971 Act they bear the narrower of the two meanings, that is that contended by the Crown.'
>
> 69. These cases show that the meaning of 'on, or in connection with' is heavily dependent both on context and policy. The phrase might require what Robert Walker LJ in Coventry Waste referred to as 'a strong and close nexus' or it might require 'a weak and loose one'. *Ben-Odeco v Powlson* introduces the concept of remoteness, which is another way of considering the same question.'

111. What we draw from the cases above is that the phrase 'in connection with' can bear a broad or a narrow meaning, and that the wording of the statute and its wider context are the best guide to its meaning.

112. ~~that~~ In determining the meaning of the words 'in connection with' as they appear in section 63, the following points emerge from their context.

113. First, we concluded above that the intention of the legislature was to ensure the confidentiality of information provided to the Ombudsman by a third party.

114. Second, as we set out above, this is particularly important in the social and historical context because (a) there must be public confidence in the Ombudsman and (b) there are real risks to the personal safety of those making complaints and those named in complaints or those who could be identified by terrorists piecing together information. Prevention of inappropriate disclosure was considered so vital that a criminal sanction was attached to section 63.

115. Third, the link to the Ombudsman's functions, in our view, reflects the dual purpose of giving confidence to the public and to those making complaints and ensuring that the Ombudsman can carry out her investigative functions effectively in the specific circumstances in Northern Ireland.

116. Fourth, the provision could have been, and is not, expressly limited to confidential information. It could have been, and is not, limited to information obtained for the purposes of, or in the discharge or exercise of any functions of the Ombudsman.

117. In our judgment these contextual features point towards the words 'in connection with' being construed relatively broadly, to minimise the risk that confidential information provided to the Ombudsman in relation to her investigations and other functions falls outside the section.

118. However we find that the connection should not be construed so broadly that it would include any information provided to the Ombudsman or information that is only remotely connected to the Ombudsman's functions. Such an interpretation would be so broad as to make the requirement of a connection to the functions effectively meaningless, and is not supported by the contextual background highlighted above.

119. The nature or content of the information itself will only be relevant in so far as it assists in identifying the connection between its receipt and any of the Ombudsman's functions.

120. In those circumstance we conclude that the words 'in connection with' do not require a strong and close nexus between the provision of the information and a function of the Ombudsman, but that there must be more than a remote

nexus between the provision of the information and one of the Ombudsman's functions.

121. The function relied on in this appeal is the power in section 62 of the Police Act 1998 to publish a statement as to the Ombudsman's actions, decisions and determinations and the reasons for her decisions and determinations.

122. We accept that section 51(4) is relevant. Under section 51(4) the Ombudsman must exercise that power in such manner as appears to her to be best calculated to secure, inter alia, the confidence of the public and of members of the police force in the police complaints system.

123. We accept, on the basis of the contents of the email at page 18 of the closed bundle, that the purpose of the Ombudsman's engagement with the film makers was to help ensure accurate reporting of the Ombudsman's findings in the 2016 public statement. Those efforts were at least reasonably closely related to the Ombudsman's functions under section 62.

124. Although it is one step removed from the function in section 62, we accept that substantive information provided to the Ombudsman as part of the Ombudsman's efforts to ensure accurate reporting of the statement was provided 'in connection with' the function under section 62.

125. Information provided for the purposes of making administrative arrangements for the purposes of having discussions for the purposes of the Ombudsman's efforts to ensure accurate reporting is at least one more step removed from the function in section 62. We find that the provision of this information is no more than remotely connected to any of the Ombudsman's functions. In our view this type of information is not received in connection with the Ombudsman's functions.

126. Taking all this into account we have considered which information in the closed bundle was received by the Ombudsman in connection with her power to publish a statement under section 62. Our specific findings in relation to each document in the closed bundle are set out in the closed annex, but our broad conclusions are as follows.

127. Where substantive information was provided to the Ombudsman as part of the Ombudsman's efforts to help ensure accurate reporting of the Ombudsman's 2016 public statement, we accept that this information was received by the Ombudsman in connection with her power to publish a public statement.

128. Where the correspondence was generated by the Ombudsman but either includes or is drawn from information provided by a third party that falls within section 63, we accept that this is information received by the Ombudsman in connection with her power to publish a public statement.

129. Where the emails or letters contain information provided purely to facilitate administrative arrangements for organising meetings, we do not accept that they contain information sent to the Ombudsman in connection with her power to publish a public statement. The provision of that information does not have a sufficiently close nexus to the relevant function. It is only remotely connected.

130. For those reasons we conclude that the decision notice was not in accordance with the law, because we have determined that some of the information is exempt under section 44. The appeal is allowed in part.

E. The grounds of appeal and the grant of permission

9. I gave the Ombudsman permission to appeal on the two grounds advanced by Mr McKay:

(1) The Tribunal misinterpreted section 63

22. The Tribunal reached the following conclusions about the scope of section 63:

(i) The word 'received' as it is used in section 63 did not mean 'held' and the fact that the word 'held' was not used, prescribed the scope of the provision [92].

(ii) It was not intended or enacted to cover any information held, the disclosure of which 'would run the risk of revealing the identity of persons who could be targeted by terrorists' [93]

(iii) The word 'received' was used to protect the confidentiality of information provided to the Appellant by a third party [94]

(iv) This was important because 'there are real risks to the personal safety of those who make complaints and those named in complaints or those who could be identified by terrorists piecing together information' [95]

(v) It included information generated that includes or is drawn from information provided by a third party [96]

(vi) It included information contained in a document received form a third party [96]

23. Before setting out the reasons why the Tribunal erred, the Appellant makes two preliminary observations. First, it was not the Appellant's case that 'received' meant 'held'. The latter is a practical consequence of the former and was not an issue on the appeal. Second there is a clear conflict between the finding at [93], that the provision was not enacted to cover information held that 'could reveal the identity of persons who could be targeted' and [95] that information in a complaint that could reveal a person's identity to terrorists was covered by the provision.

24. The interpretation placed on the provision by the Tribunal focused on the identity of complainants and the details of their complaints. This is demonstrably not the purpose of the provision: complainants are frequently identified in Public Statements and the nature of the complaints summarised. Complaints to the Appellant's office relate to conduct of police officers and, particularly in the context of Loughinisland, police officer's relationships with suspected terrorists who may also be acting as covert human intelligence sources (informants). The risk includes that to officers: see *Re C & Others* [2012] NICA 47 and informants: *R v Hennessey* (1978) 68 Cr App R 419, 425 and not generally, complainants.

25. It would largely be meaningless to protect the identity of the complainant. The Department of Justice Guidance defines 'member of the public' for the purpose of a complaint in the following terms:

> 4.25 'members of the public' - Complaints alleging misconduct can be received only from members of the public who have had occasion to be well informed as to the facts of the incident. There is no need to record and process complaints from persons not involved in the incident. Thus, if someone views an incident on the TV or on social media, they are not personally involved. Complaints should, though, be recorded if the member of the public was either personally involved in the incident, or is the relative or friend of someone who was and who is acting on their behalf. However, while other approaches from members of the public will not provide a basis for recording a complaint under Part 7 of the 1998 Act, the Ombudsman will no doubt wish to consider whether they provide grounds for investigation and should arrange for them to be replied to and the matter explained, so far as this is practicable.

26. They are therefore likely to be known to the police officer about whom they are complaining. The risk of impropriety from a police officer of the nature envisaged by the Tribunal would be extremely low.

27. The information 'received' for the purposes of section 63 is that arising from the Appellant's investigations consequent on receipt of a complaint.

28. The interpretation placed on the provision by the Tribunal fails to look at the section 63(1) in its entirety. … [Language of section 63 omitted]

29. Section 63(1)(e)(ii) demonstrates the difficulty with the Tribunal's approach. The Appellant may publish a summary or other general statement (including a statement under section 62) which does not (unless she considers it is necessary in the public interest to act to the contrary) identify any person *to whom the information relates*. The identity of the person to whom the information relates does not need to be disclosed in the information received but can be – and often is - a conclusion reached by the Appellant as to the identity of person or persons 16 8 previously not known by the complainant. Typically, this might be a police officer working in a sensitive role (such as Special Branch or other intelligence-related position) or an informant.

30. This would fall outside the scope of the 'received or generated from' interpretation as determined by the Tribunal but within the scope of the formulation advanced by the Appellant.

(2) The Tribunal erred in its approach to the effect of section 63 as a penal provision

31. The Tribunal reached two conclusions on this issue:

(i) That the 2000 Act does not involve a penal element; and

(ii) The First Respondent's interpretation of what was meant by 'received' was not unclear.

32. The Tribunal erred in that the 2000 Act does have a penal element: see section 54 of the 2000 Act.

33. The Tribunal further erred in concluding that because the First Respondent's interpretation was not unclear no issue arose: it was not the First Respondent's interpretation that was determinative of whether there was

ambiguity but whether on its face the provision was capable of more than one reasonable interpretation.

34. The Tribunal relied on the decision in Gordon in support of the two conclusions reached. It fell into error in doing so, for the following reasons:

(i) The Upper Tribunal in *Gordon* was dealing with facts that are distinguishable from the present case;

(ii) There was in fact no ambiguity or competing interpretation advanced in that case: see para 27 of the judgment in *Gordon*;

(iii) The Upper Tribunal mis-stated the principle in any event.

35. The principle (not presumption) was re-stated in *Sweet v Parsley* [1970] AC 132, 'it is a universal principle that if a penal provision is reasonably capable of two interpretations that which is most favourable to the accused must be adopted'.

36. In the present case, three interpretations were open to the Tribunal. The first a literal, not purposive, interpretation (which no party supported). The second, that advanced by the First Respondent: received included information received or generated from received (which the Tribunal adopted) or the Appellant's formulation: that the information would not exist but for information received (this would include, information generated but also preparatory and/or incidental and/or consequential to that received). In each case it was agreed that the information needed to relate to the Appellant's powers and functions.

37. The Appellant's case was that in the face of two reasonable interpretations the effect of the principle was to favour the interpretation advanced by the Appellant. Indeed, the Appellant's case was that on this question the Tribunal had no discretion.

F. Analysis

Statutory interpretation

10. The most authoritative statement of the approach to statutory interpretation was given by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2023] AC 255. The tribunal relied on these paragraphs:

29. The courts in conducting statutory interpretation are seeking the meaning of the words which Parliament used: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

> 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.'

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source

by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

> 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'

11. As the Ombudsman did not rely on external aids, the meaning of section 63 depends on the language of the section in its context.

The parties' competing interpretations

12. The Ombudsman and the Commissioner proposed different interpretations of section 63. It is not my role to decide which is preferable. My role is to decide what the

section means. However, it is necessary to know each party's view in order to understand their arguments, especially the Ombudsman's argument.

13. The Ombudsman argued that section 63 applied to 'any material that would not exist but for the information received by her and related to her powers and functions.' Those are Mr McKay's words in paragraph 16(c) of his skeleton argument. The tribunal rejected that argument.

14. The Commissioner argued that section 63 covers: (a) 'information sent to the Ombudsman by a third party'; and (b) any 'information that includes or is drawn from information provided by a third party'. That is the tribunal's statement at [96] of the Commissioner's argument, which the tribunal accepted.

The language of section 63

15. Any analysis of legislation must begin with the language.

16. The phrase must be interpreted as a whole, although it may be helpful to consider parts of it separately. That was the approach taken by the House of Lords in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 448 at 352. The issue concerned section 35(1)(a)(i) of the Social Security Act 1975, which contained a condition of entitlement to attendance allowance:

> A person … is so severely disabled physically or mentally that, by day, he requires from another person … frequent attention throughout the day in connection with his bodily functions …

Lord Bridge spoke for the House:

> The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately.

In taking that approach, he did 'break down and attempt to analyse the language'. I have followed that approach to section 63.

17. The information must be 'received'. That means 'taken in'. It indicates that the information came from someone other than the Ombudsman or the officers. In the tribunal's words, it must come from a 'third party'. That is the natural meaning of the word.

18. Section 63(1)(a) to (e) contain some exceptions that allow disclosure. They are circumstances in which disclosure would otherwise be prohibited. The exception in section 63(1)(e) is useful in interpreting the section as a whole. It relates to statements made by the Ombudsman, including one published under section 62. It is subject to two qualifications. Qualification (i) contains an absolute prohibition on identifying the person from whom the information was received. That matches the language of section 63(1) and presupposes that there is a person from whom the information was received. And that supports the analysis that the section is concerned with information received from third parties. Otherwise, the more natural wording for the qualification would be 'does not identify *any* person from whom the information was received'.

19. The information must not be 'disclosed'. That means 'passed on' to someone who, or for a purpose which, is not listed in section 63(1)(a)-(e). Again, that is the natural meaning of the word. Disclosure may happen directly by passing on the information received. Or it may happen indirectly by saying something that in effect

discloses the information received. Sometimes, it will be a matter of judgment whether that has occurred. This is unavoidable with language. I have in the past used the example of a car. (a) The brand new vehicle sitting in the show room is a car. (b) If someone steals the wheels, it is a car without wheels. (c) Years later, all that remains is the rusting bodyshell in a scrap yard. It used to be a car, but not any longer. At some point between (b) and (c) the car ceased to exist, but there is no precisely defined point at which that happens. That does not mean that the statutory language is ambiguous or uncertain or even unclear. It just means that there are borderline cases that depend on judgment in the particular circumstances of an individual case. To put it another way, the uncertainty arises in the application of the language not in its meaning.

Section 63 and FOIA

20. FOIA is not part of the context in which section 63 has to be interpreted.

21. Section 63 of the 1998 Act has to be interpreted independently of FOIA. It was enacted before FOIA. Its meaning and effect were not affected when FOIA was enacted. Quite the reverse. Whether or not FOIA applies depends on the meaning and effect the section would have if FOIA did not exist. That is the significance of the words in brackets in section 44: '(otherwise than under this Act)'.

22. Section 63 has been the focus of this decision. That is because the Ombudsman relied on section 44, which applies when disclosure is prohibited under any enactment. The section is not the only protection available under FOIA. It is not the only absolute exemption. Section 41, which protects information subject to a duty of confidence, is also an absolute exemption. Failing that, there may be other relevant qualified exemptions that involve a balance of the public interests under section 2(1)(b) and (2)(b). Indeed, the Ombudsman relied on section 30 in addition to section 44. The point I wish to make is this. Section 44 is not the only protection in FOIA against disclosure, so there is no need to give it an interpretation that it does not properly bear just because there is a good reason why information should be protected from disclosure.

23. The same point is true of section 63. It is not the only protection against disclosure. All that section 63 does is to identify: (a) the persons who will commit an offence; and (b) the nature of the information that they must not disclose. In addition, as a minimum, there will protection provided by contractual provisions and the duty of confidence. The latter, as I have said, is protected under FOIA section 41. Once again, there is no need to give section 63 an interpretation that it does not properly bear just because there is a good reason why information should be protected from disclosure.

24. I have emphasised these points because underlying Mr McKay's arguments is the importance of protecting information from disclosure. That is understandable, especially given the kind of information that the Ombudsman may hold and the consequences that may follow from its disclosure. Lives may literally depend on information not being disclosed. The flaw in the argument is to assume that section 63 has to be given a particular meaning in order to prevent it. Mr McKay's ingenious argument sought to create a wide context to support his interpretation. I do not accept that argument. It may be an appropriate context for some purposes, but not for the interpretation of section 63.

Section 63 as a criminal provision

25. Section 63 creates a criminal offence. Like all penal provisions, its purpose is not exclusively penal. It punishes those who fail to comply, but it also deters those who might be tempted to disclose from doing so. The deterrent effect is in a sense more important than punishment. The primary purpose of the section is to preserve the confidentiality of the information. Punishment only happens when deterrence has failed. But the creation of a criminal offence is central to how the section works. It provides both the deterrent and the means of enforcement. Accordingly, the section must be interpreted in accordance with any principles that apply to criminal statutes.

26. Mr McKay relied (skeleton argument at paragraph 14) on 'the principle against penalisation under a doubtful law', which he described as 'an aspect of legal policy.' I accept that that is a relevant factor. It is relevant to 'an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words', to quote *R (O)* at [31]. I do not, though, accept Mr McKay's arguments that seek to justify giving a wider meaning to the section than my analysis of the language. First, there is nothing doubtful about the language of section 63. There may be issues of judgment involved, but that is unavoidable with language and, in any event, the issues relate to application rather than interpretation. Second, expanding the scope of a provision beyond the usual meaning of its language is not necessarily an appropriate way to identify the meaning of a reasonable legislature. That is especially so when the legislature was by the statute creating a criminal offence. When a provision creates a criminal offence in clear language, the surest way to an objective assessment of its meaning is to rely on that language.

Conclusion

27. For those reasons, I dismiss the appeal.

Authorised for issue
on 21 August 2025

Edward Jacobs
Upper Tribunal Judge