



Northern Ireland

Public Services

Ombudsman

Investigation Report

Investigation of a complaint against the Department for Infrastructure

NIPSO Reference: 16716

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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. She may also investigate and report 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.

Where the Ombudsman finds maladministration or questions the merits of a decision taken in consequence of the exercise of professional judgment she must also consider whether this has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. The Ombudsman may recommend a remedy where she finds injustice as a consequence of the failings identified in her report.

The Ombudsman has discretion to determine the procedure for investigating a complaint to her Office.

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.

Before the Ombudsman decides to publish a report under section 44 she will take into account the interests of the person aggrieved and any other person she considers appropriate.

As far as possible any personal details which might cause individuals to be identified in this report have been removed.

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EXECUTIVE SUMMARY

I received a complaint on behalf of Belfast City Airport Watch Limited (BCAWL) regarding the actions of the Department of Environment¹ (the Department) in relation to George Best Belfast City Airport (the Airport). BCAWL complained that the Department failed to enforce the 2008 Planning Agreement between it and the Airport. BCAWL also complained about the Department's handling of its complaint.

Issues of Complaint

I accepted the following issues of complaint for investigation:

- Issue 1: The Department's enforcement action in relation to the 2008 Planning Agreement; and
- Issue 2: The handling of BCAWL's complaint by the Department.

Findings and Conclusion

The investigation of the complaint has identified the following instances of maladministration by the Department:

- The Department failed to establish an **operational** definition of the phrase 'exceptional circumstances' for the purpose of monitoring the Airport's compliance with the 2008 Planning Agreement;
- The Department failed to gather data on a regular and systematic basis on late flight movements from 2008 to 2011 for the purpose of monitoring the Airport's compliance with the 2008 Planning Agreement;

¹ The Departments Act (Northern Ireland) 2016 provided for the functions and services delivered by the Department of Environment to be transferred to the Department for Infrastructure with effect from 9 May 2016. Therefore the responsibility for this complaint was transferred from the Department of Environment to the Department for Infrastructure. I referred in this report to all actions by the Department of Environment as if they had been taken by the Department for Infrastructure.

- The Department failed to establish guidance for staff and an administrative framework for the monitoring of the Airport's compliance with its obligation under the 2008 Planning Agreement;
- The Department failed to keep written records relating to decisions about compliance of the 2008 Planning Agreement; and
- The Department failed to investigate BCAWL's complaint thoroughly and provide adequate responses to concerns raised.

Recommendations

Having regard to all the facts and circumstances of this case and the nature and extent of the injustice sustained by BCAWL in consequence of the identified maladministration, I recommended that the Department:

- Make a payment of £1000 by way of a solatium together with an apology to BCAWL to effect a fair settlement of the matters complained of. This payment reflects the injustice of frustration, outrage and uncertainty relating to the Department's action pursuant to the 2008 Planning Agreement. It also reflects the injustice of frustration and uncertainty about the complaint handling and time and trouble in pursuing the complaint. The Department should provide the apology and payment within one month of the date of this report.
- Should forthwith enter into discussions with the Airport with a view to establishing an operational definition of 'exceptional circumstances'. The Department should provide this Office with an update on the progress of these discussions within three months of the date of this report. Where the Department and the Airport establish an agreed operational definition of exceptional circumstances, the Department should establish an administrative framework and operating procedures for analysing data, record keeping and recording reasons for decisions, for the purpose of monitoring the 2008 Planning Agreement.

- In the absence of an agreement with the Airport on the operational definition of 'exceptional circumstances', the Department should establish guidance on the meaning of exceptional circumstances for use by its staff. The guidance should then be used as part of the Department's administrative framework to monitor the 2008 Planning Agreement. This framework should also include operating procedures for analysing data, record keeping and recording reasons for decisions. The Department should provide this Office a copy of the guidance, administrative framework and operating procedures within nine months of the date of this report.
- Provide training to ensure that relevant staff are aware of the importance of responding to complaints in an effective manner. The Department should provide an update within three months of the date of this report to ensure this recommendation has been implemented. This should be supported by evidence to confirm that appropriate action has been taken.

THE COMPLAINT

1. I received a complaint on behalf of Belfast City Airport Watch Limited (BCAWL) regarding the actions of the Department of Environment² (the Department) in relation to George Best Belfast City Airport (the Airport). BCAWL complained that the Department had failed to enforce the 2008 Planning Agreement³ between it and the Airport. In particular, the complainant believes that the Airport is abusing the exceptional circumstances clause of the 2008 Planning Agreement with regard to flight arrivals and departures between 21:31 and 23:59 and no action is being taken by the Department. However the Airport is not a listed authority within my jurisdiction and this report relates solely to the complaint about the Department. BCAWL also complained about the Department's handling of its complaint. The Departments Act (Northern Ireland) 2016 provided for the functions and services delivered by the Department of Environment to be transferred to the Department for Infrastructure with effect from 9 May 2016. Therefore the responsibility for this complaint was transferred from the Department of Environment to the Department for Infrastructure. I will refer in this report to all actions by the Department of Environment as if they had been taken by the Department for Infrastructure.

Background

2. BCAWL is a company combining 13 Residents Associations and Community Groups and a Trade Union Branch. It has also some 770 individual Associate Members. The purpose of the Company is the protection of the environment and protection of the thousands of citizens living in densely populated areas of the City of Belfast and North Down. The company aims to achieve this goal by limiting the excessive impact of Airport operations and in particular to restrict

² Following reorganisation of Northern Ireland Central Government on 9 May 2016, the functions and services delivered by the Department of Environment have been transferred to the Department for Infrastructure. The 2008 Planning Agreement is now between the Department for Infrastructure and The Airport.

³ Planning authorities can use planning agreements to overcome obstacles to the grant of planning permission where these cannot be addressed through the use of conditions. A planning agreement may facilitate or restrict the development or use of land in any specified way, require operations or activities to be carried out, or require the land to be used in any specified way. A breach of a planning agreement may be enforced by way of a court injunction.

the impact of unreasonable noise disturbance from these operations.

3. The Airport has established a number of measures designed to prevent and reduce noise, its associated potential health effects and to engage with and support neighbouring communities. A number of these measures are stipulated in a modified Planning Agreement concluded in 2008. One of these measures includes restricted flight operating hours.
4. On 22 January 1997 the Department entered into a planning agreement [the 1997 agreement] with Belfast City Airport Limited and Shorts Brothers PLC. On 14 October 2008 the 1997 Agreement was modified by the 2008 Planning Agreement between the Airport and the Department. The modification to the 1997 agreement in 2008 followed an Independent Examination held in public in June 2008. However there was no modification to the restricted flight operating hours. On 23 February 2012 the Airport submitted a request to the Department to modify the 2008 Planning Agreement. This request did not include a modification to the restricted flight operating hours.

Relevant Legislation

5. Under Article 40A of the Planning (Northern Ireland) Order 1991 (the 1991 Order), the Department was empowered to discharge or modify a planning agreement, either by agreement with the party against whom the agreement is enforceable, or pursuant to an application by such party once a period of five years had expired from the date on which the agreement was made.
6. Section 76 of the Planning Act (Northern Ireland) 2011 (the 2011 Act) has replaced Article 40 of the 1991 Order in respect of planning agreements. The Planning (Modification and Discharge of Planning Agreements) Regulations 2015 (the 2015 Regulations) came into operation on 22 April 2015. Schedule 2 of the 2015 Regulations makes transitional provisions in respect of the Article 40 agreement between the Department and the Airport and allows for modification or discharge of same under Section 77.

Issues of Complaint

7. The issues of BCAWL's complaint which were accepted for investigation are as follows:

Issue 1: The Department's enforcement action in relation to the 2008 Planning Agreement; and

Issue 2: The handling of BCAWL's complaint by the Department.

INVESTIGATION METHODOLOGY

8. As part of my investigation, written enquiries were made of the Department and documentation relating to the case was examined by the Investigating Officer at the Department's Office. The Department provided written responses to detailed enquiries, together with copy documentation relating to the circumstances of BCAWL's complaint. An examination of relevant legislation, policy and procedures was undertaken.
9. As Ombudsman, my role in planning complaints relates primarily to the examination of the administrative actions of the Department. It is not my role to challenge or give my opinion on the merits of discretionary planning decisions unless I have identified maladministration. I have not included every detail of the investigation in this report. However, I am satisfied that everything I consider to be relevant and important has been taken into account in reaching my findings. This investigation has examined only the Department's actions relating to the 2008 Planning Agreement and the Department's complaints handling from 8 June 2015. I acknowledge that the complainant's concerns predate the 2008 Planning Agreement. I note that the complainant also has raised concerns about alleged abuse by the Airport of the exceptional circumstances clause. However, as stated previously in this report, the Airport is not a body in my jurisdiction and I am unable to investigate those concerns.

Relevant Standards

10. 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 relevant to this complaint are the Ombudsman's Principles⁴:

- The Principles of Good Administration
- The Principles of Good Complaint Handling

These principles are set out in full in the Appendices to this report.

11. The specific standards are those which applied at the time the events occurred and which governed the exercise of the regulatory and statutory functions of the Department. The specific standards relevant to this complaint are:

- The Planning (Northern Ireland) Order 1991 (the 1991 Order)
- The Planning Act (Northern Ireland) 2011 (the 2011 Act)
- The Planning (Modification and Discharge of Planning Agreements) Regulations 2015 (the 2015 Regulations)
- The 2008 Planning Agreement
- Making a Complaint about Planning (Department of Environment)
- The Statutory Principles of Good Regulation (2006)

⁴ These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association

MY INVESTIGATION

Issue 1: The Department's enforcement action in relation to the 2008 Planning Agreement

Detail of the BCAWL complaint

12. BCAWL complained that the Department failed to enforce the terms of the 2008 Planning Agreement made between it and the Airport with the result that the public are not receiving the environmental protection from the Department to which they are lawfully entitled. BCAWL complained that the 2008 Planning Agreement provides for the following - '*Only in exceptional circumstances to permit delayed aircraft to use the Aerodrome during the extended hours*'. They believe that since the date of the 2008 Planning Agreement there have been hundreds of late flights each year and the Department is not willing to attempt to restrict the obvious 'abuse' of the terms of the 2008 Planning Agreement. BCAWL complained that the 2008 Planning Agreement was drafted and approved by solicitors experienced in aviation matters on behalf of both parties and both parties voluntarily executed the binding document.
13. BCAWL assert that the phrase 'exceptional circumstances' was clearly sanctioned by both parties and their legal representations. BCAWL believe that both parties must have been aware that the phrase had been judicially defined by Lord Bingham, President of the Supreme Court, in 2000. BCAWL believe that in applying Lord Bingham's definition to the hundreds of late flights since 2008 it is obvious that there is a serious and on-going breach of the terms of the 2008 Planning Agreement which is causing real distress and worry to thousands of affected residents.
14. BCAWL complained that when it asked the Department to set out the circumstances of a late arrival which it would be regarded as not to be exceptional, the Department has been unwilling or unable to do so. BCAWL believe that the Department is not prepared to comply with the obligations and

its responsibilities agreed in the 2008 Planning Agreement.

Evidence Considered

15. During this investigation I considered a range of evidence, including correspondence between the parties involved, as well as submissions to my Office by the Department in response to my enquiries. The evidence that I consider relevant for the purposes of my investigation is set out below.
16. The Department responded on 17 June 2015 to BCAWL's complaint at stage one of its complaints process as follows:
'In relation to your comments regarding the meaning of the term 'exceptional circumstances', the Department has never purported to define "exceptional circumstances" and will continue to construe the term by reference to the applicable planning context and particular circumstances'.
17. In response, BCAWL on 6 August 2015 asserted that the Department '*... ignored the definition of "exceptional circumstances" given by Lord Bingham (President of the Supreme Court). We quote "To be exceptional a circumstance need not be unique, or unprecedented or very rare, but it cannot be one that is regularly, or routinely, or normally encountered"*'.
18. The Department responded on 16 September 2015 as follows:
'...the agreement does not contain a definition of 'exceptional circumstances' and in this situation, the Department is legally entitled to construe the term by reference to the applicable context and particular circumstances'.
19. In response to detailed enquiries as part of my investigation, the Department informed my Investigating Officer that '*the original 1997 Planning Agreement was drafted such that only in exceptional circumstances are delayed aircraft to use the aerodrome during extended hours (9.31 to 11.59pm). The 2008 modification did not change the wording of this obligation. It is understood that the agreement was drafted in this way to enable the Department to exercise*

judgement regarding compliance'. The Department confirmed further that it *'has not defined the expression or drafted a definition of the expression "exceptional circumstances"'* and *'the Department considers the expression to broadly mean "out of the ordinary" and it is a matter of judgement in terms of the context of the obligation within the Planning Agreement*'.

20. The Department further explained that *'as the individual officers who helped draft the 2008 Agreement are no longer with the Department, it was considered safe to assume that the language, which originated from the 1997 Agreement, was drafted in non-specific terms to allow for some flexibility in interpretation*'. Further, it confirmed that *'the phrase "out of the ordinary" is not a formal definition used by the Department but simply an explanation as to how the Department interprets the term "exceptional" in the context of late flights. There is no guidance on the issue of delayed flights and this interpretation has not been published anywhere else*'.
21. As part of my investigation, the Investigating officer asked the Department to provide the number of extensions (after 9.31 pm) arriving at and departing from the Airport from 2012. These were to be identified and broken down into 30 minute slots. The Department informed the Investigating Officer that *'the information submitted every two months has not been provided in this format and has not been categorised in this way by the Department*'.
22. In response to enquiries about how the Department considers the information regarding flight extensions provided by the Airport to it, the Department confirmed that it *'considers the information submitted on a bi-monthly basis but does not have a written procedure or guidance for this process. No independent validation is sought*'. Further, the Department also explained that *'No extensions have been queried [with the Airport] and no clarification has been sought from the Airport by the Department on any specific extension*'. It also stated that *'the extension logs are scrutinised on a bi-monthly basis when they are received to the best of the Department's ability, having particular*

regard to the time of the late flight and the reason supplied’.

23. As part of my investigation, in response to further enquiries regarding the information about flight extensions provided by the Airport to the Department, it informed the Investigating Officer that *‘the extension logs are provided as a list in date order of the late flights each calendar month. The reasons supplied are examined in detail but it has not been considered necessary to re-categorise the information by airline, Airport or reason for the delay as this has no bearing on whether or not each flight is considered exceptional’.* The Department also explained that *‘the total number of extensions since the 2008 Agreement up and including March 2016 is 3073, all of which were considered exceptional by the Department’.* Furthermore it explained that *‘the Planning Agreement with the Airport is the only one of its kind in Northern Ireland. It is not considered necessary to draw up specific guidance of the action to be taken to scrutinise compliance with one clause within this Planning Agreement. Scrutiny is simply carried out through a thorough examination of the information provided’.*
24. The Department also informed the Investigating Officer that it has *‘recognised that the amount of late flights has remained consistently around 1% of overall movements each year’* and *‘the reference to delayed flights as a percentage of air traffic movements is provided to aid understanding of the proportion of delayed flights in relation to overall traffic movements’.* It further stated that *‘in considering the late flight restriction the Department has given weight to the fact that the overall percentage has remained consistently low and that the majority of late flights occur within the first half hour after 9.30pm’.* I note with concern that this approach was criticised by the EIP report published in 2006⁵. In particular that report states - *‘It is our view that the practice of quantifying the delays as a percentage of overall scheduled ATMs [Air Traffic Movements] is unhelpful and largely meaningless’.*
25. In response to enquiries about the enforcement action taken by the

⁵ Examination in Public (EIP) Panel Report on Belfast City Airport Planning Agreement (31 August 2006) at paragraph 5.4.20

Department, it stated that it takes *'enforcement action in any situation on a discretionary rather than a statutory basis. The enforcement mechanism for breaching a planning agreement is injunction through the courts'*.

26. In relation to enquiries as to why no delayed flight records are held by the Department from 2008 - 2011 it stated that *'in 2011, the Airport agreed to the Department's request to submit information on delayed flights every 2 months. Any information supplied before this date was provided and considered on an ad hoc basis or obtained from reports prepared for the Airport Forum⁶. In 2011 it was considered that the Airport should submit information on seats for sale and Extensions on a formal and regular basis to assist the Department in regularly and reliably monitoring compliance with these aspects of the planning agreement'*. The Department further advised that the information on late flights *'is carefully considered with particular regard to the time of the late flight and the reason provided, and discussed at internal staff meetingshowever formal written records of the discussions or meetings are not kept'*.
27. In investigating this complaint I have considered correspondence between the complainant and former Environment Ministers. By letter of 3 September 2010 to the then Environment Minister BCOWL stated:
'The Planning Service has confirmed to us that it is not enforcing the 9:30pm curfew stipulation in the Planning Agreement'.
28. By letter of 30 November 2011 to the then Environment Minister BCOWL further stated:
'We are heartened by the fact that you have asked your officials to obtain from the Airport regular bi-monthly reports on the reasons for the many late flights which occur after 9:30pm. We note correspondence received from your Department which states that it is obtaining all such information going back to 1st February 2011 in a report which should be available by the end of

⁶ In 1993, the Airport established a consultative committee, the Airport Forum. The purpose of this Forum is to enable the Airport to exchange information and ideas with those groups which have an interest in matters concerning the Airport and to allow views of interested parties to be raised and taken into account. It is not a decision making body.

November... We further hope that you will scrutinise carefully the reasons given for late flights and that, where you deem that the circumstances were not 'exceptional', you take action to ensure that the Airport complies with the relevant 'late flights' clause in the Planning Agreement'.

29. In a letter to the Airport on 19 November 2011 the Department stated:
'The Extension log sheet can be submitted on a quarterly basis...and it would be helpful to agree the appropriate reporting periods. We suggest the periods 31 December, 31 March, 30 June and 30 September'.
30. In a further letter to the Airport on 15 December 2011 the Department stated that:
'The Minister has asked...the Extensions Log Information be submitted on a bimonthly basis (every 2 months) if possible. I would suggest the periods 31 January, 31 March, 31 May, 31 July etc'.
31. The Department as part of my investigation provided the following reports of flight extensions supplied to it by the Airport:

2010	November, December
2011	January, February, March, April, May, June, July, August, September, October, November, December
2012	January, February, March, April, May, June, July, August, September, October, November, December
2013	January, February, March, April, May, June, July, August, September, October, November, December
2014	January, February, March, April, May, June, July, August, September, October, November, December
2015	January, February, March, April, May, June, July, August, September, October, November, December
2016	January, April, May, June, July

32. As part of my investigation I have considered relevant extracts from the 2008 Planning Agreement as follows:

Part I

'Definitions and interpretation

Permitted hours means between the hours of 6.30am and 9.30pm local time

Prohibited hours means between the hours of 9.31pm and 6.29am local time

Extended hours means between the hours of 9.31pm and 11.59pm local time

Part II

The Restrictions

Hours

No scheduled aircraft except delayed Aircraft shall use the Aerodrome during prohibited hours

No delayed Aircraft shall use the Aerodrome except during Permitted hours or Extended hours

Part III

Obligations

Hours

***Only** [my emphasis] in exceptional circumstances to permit Delayed Aircraft to use the Aerodrome during the Extended Hours'*

Investigation Analysis and Findings

33. The BCAWL complained to my Office that the Department failed to enforce the terms of the 2008 Planning Agreement and in consequence the public are not receiving the environmental protection from the Department to which they are lawfully entitled.
34. There has been no enforcement action taken by the Department against the Airport in relation to delayed flights. The route to enforcing a breach of an obligation under the 2008 Planning Agreement is by way of legal action for breach of contract. I have considered this issue of complaint in two respects (a) **the Department's operational definition of the phrase 'exceptional circumstances'**; and (b) **the Department's monitoring of the 2008 Planning**

Agreement. I acknowledge that the definition of ‘exceptional circumstances’ in the 2008 Planning Agreement is a matter for the parties to that Agreement to agree.

Issue 1(a) –the Department’s operational definition of the phrase ‘exceptional circumstances’.

35. In relation to the Department’s use of the phrase ‘exceptional circumstances’ I note that the 2008 Planning Agreement outlines the obligations regarding late flights during extended hours. These are - ‘*only in exceptional circumstances to permit delayed aircraft to use the Aerodrome during the Extended hours*’ [that is between the hours of 9:31pm and 11:59 pm local time]. I note that there is no definition of ‘exceptional circumstances’ in the 2008 Planning Agreement. As stated above I acknowledge that the definition of ‘exceptional circumstances’ in the 2008 Planning Agreement is a matter for the parties to that Agreement to agree. I also note there is no operational definition of ‘exceptional circumstances’ (paragraph 32 refers) provided by the Department for monitoring purposes.

36. There are statutory principles for good regulation⁷ that complement the Principles of Good Administration and are particularly relevant to the Department’s regulatory activity under investigation in this report. Good Regulation should be:

- (a) Targeted;
- (b) Proportionate;
- (c) Consistent;
- (d) Transparent; and
- (e) Accountable.

The Transparency principle reflects the need to ensure that ‘those we regulate are able to understand what they can expect of us and what is expected of them’. This principle is particularly relevant in the context of BCAWL’s

⁷ Legislative and Regulatory Reform Act 2006, Part 2

complaint about the Department's failure to take enforcement action.

37. In response to enquiries as part of my investigation, the Department informed the Investigating Officer that it did not define the expression or draft a definition of *'exceptional circumstances in the original Planning Agreement of 1997'*. Further, the Department confirmed that *'the modification of 2008 did not change the wording'*. The Department also stated that it considers the expression to broadly mean *'out of the ordinary'* and this expression is not a *'formal definition used by the Department but simply an explanation as to how the Department interprets the term 'exceptional' in the context of late flights'*. The Department also clarified that *'it is a matter of planning judgement in terms of the context of the obligation within the Planning Agreement... and it was considered safe to assume that the language, which originated from the 1997 Agreement was drafted in non-specific terms to allow for flexibility in interpretation'* (paragraph 19 refers).
38. I find the Department's failure to establish an operational definition of *'exceptional circumstances'* for the purposes of monitoring compliance with the 2008 Planning Agreement in this instance, fails to take account of established good practice in regulation as it does not meet the Transparency principle. This principle is a key element of good regulation.
39. Further, I consider that the Department, in failing to provide an operational definition of *'exceptional circumstances'* for monitoring purposes does not meet the requirements of the Third Principle of Good Administration *'Being open and accountable'*. The Airport, the Department, the residents, staff and the general public must understand what had been intended by this obligation so as to ensure openness and accountability in the Department's monitoring activity. The complainant refers to Lord Bingham's definition⁸ of *'exceptional circumstances'*, who states that *'it describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or*

⁸ RvKelly (Edward) (2000) 1 QB 198, Lord Bingham CJ at 208

uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered'. That dicta was an interpretation of what is meant by exceptional in section 2 of the Crime (Sentences) Act 1997. The literal meaning of the phrase however is a useful starting point. I acknowledge also that *'the language was drafted [in the 1997 Agreement] in non-specific terms to allow for some flexibility in interpretation'*.

40. However, in my view, good administration requires openness and transparency and also good regulation is characterised by transparency. The Department ought to have an operational definition of the phrase in the planning context for the purposes of its regulatory function and for the benefit of the Airport, the residents, the general public and its staff who are responsible for monitoring the flight activities.
41. Of concern is that *'the total number of extensions since the 2008 Planning Agreement up to and including March 2016 is 3073, all of which were considered exceptional by the Department'* (paragraph 23 refers). The Department confirmed also that *'no extensions have been queried and no clarification has been sought from the Airport by the Department on any specific extension'* (paragraph 22 refers).
42. I consider that the Department ought to, in line with good administrative and regulatory practice, have defined for **operational** purposes the phrase 'exceptional circumstances' so as to ensure effective monitoring and compliance of the 2008 Planning Agreement. Such clarity would have allowed for efficient monitoring of the 2008 Planning Agreement. This lack of a threshold definition for monitoring purposes suggests that the Department failed to give proper consideration to enforcing the relevant part of the 2008 Planning Agreement. As a consequence of this failing I consider that the Department are unable to effectively monitor late flight movements at the Airport so as to ensure that the Airport operates within its 2008 obligations. I will examine the

inadequacy of the Department's monitoring (of late flight movements) below.

Finding: The Department failed to establish an operational definition of the phrase 'exceptional circumstances'. I consider this failure to constitute maladministration.

Issue 1(b) – the Department's monitoring of the 2008 Planning Agreement.

43. In relation to the Department's Monitoring of the 2008 Planning Agreement, it has stated that '*extension logs are provided [by the Airport] as a list in date order of the late flights each calendar month*' (paragraph 23 refers). In response to further enquiries about relevant guidance on scrutinising compliance with the relevant clause, the Department informed the Investigating Officer that '*scrutiny is simply carried out through a thorough examination of the information provided*' (paragraph 22 refers).
44. I note that the Department also explained that '*any information supplied before [2011] was provided and considered on an ad-hoc basis or obtained from reports prepared for the Airport Forum*'. However, my investigation has not identified any such reports for the time period preceding November 2010 (paragraph 31 refers). Further, I note that in a letter from BCAWL of 3 September 2010 to a former Environment Minister it stated that Planning Service confirmed to BCAWL that '*it is not enforcing the 9.30pm curfew stipulation in the Planning Agreement*' (paragraph 27 refers).
45. In a letter of 30 November 2011 from BCAWL to a former Environment Minister, it states that officials had been asked by [the Minister] '*to obtain from the Airport regular bi-monthly reports on the reasons for the many late flights which occur after 9.30pm*' and that '*information going back to 1st February 2011 would be available by the end of November [2011]*' (paragraph 28 refers).

46. Based on all available evidence, I conclude that from the period 2008 to November 2011 the Department did not collect data for the purpose of monitoring flight activity. The Department appears to have commenced data collection on a regular and formal basis only as a result of correspondence from BCAWL to the former Environment Minister. I conclude this because as a result of the intervention of the former Minister in November 2011, extension logs were provided on a bi-monthly basis. Of concern also is the failure by the Department to encode that data to facilitate adequate analysis and determine the Airport's compliance with the 2008 Planning Agreement.
47. In response to my enquiries, the Department has also advised that *'it is not considered necessary to draw up specific guidance of the action to be taken to scrutinise compliance with one clause within the Planning Agreement. Scrutiny is simply carried out through a thorough examination of the information provided'* (paragraph 23 refers).
48. There is no evidence available of discussions to illustrate how the Department determined (based on the collected data) whether any of the late flight movements met the exceptional circumstance threshold. The Department has confirmed as part of my investigation that information on late flights *'is carefully considered with particular regard to the time of the late flight and the reason provided, and discussed at internal staff meetingshowever formal written records of the discussions or meetings are not kept.'* In the absence of an operational definition of 'exceptional circumstances' and established policy on how to analyse the delayed flights data together with evidence of internal deliberations of that data, I conclude the Department has not adequately met its regulatory responsibilities in enforcing the 2008 Planning Agreement.
49. In considering this element of BCAWL's complaint, I am critical of the Department's ad-hoc approach to gathering data on late flight movements during the extended hours from 2008 until 2011. I consider that in the absence of regular, consistent and timely evidence gathering, the Department could not

have adequately satisfied itself that the Airport was operating within its legal obligations. As previously noted the BCAWL informed the former Environment Minister in September 2010 that the '*Planning Service has confirmed to us [BCAWL] that it is not enforcing the 9.30pm curfew stipulation in the Planning Agreement*' (paragraph 27 refers).

50. The First Principle of Good Administration 'Getting it right' requires a public body to act with regard for the rights of those concerned. The Fourth Principle 'Acting fairly and proportionately' requires a public body to ensure that actions are proportionate, appropriate and fair. The Department's failure to collect data on a regular and systematic basis demonstrates a failure to meet these principles.

Finding: The Department failed to collect data on a regular and systematic basis on late flight movements from 2008 to 2011 for the purposes of monitoring the Airport's compliance with the 2008 Planning Agreement. I consider this failing to constitute maladministration.

51. There is no Departmental administrative framework for monitoring the 2008 Planning Agreement relating to extended operating hours. I note that the Department does not have guidance for staff, procedures or internal staff guidelines (to include how the data gathered should be analysed). The First Principle of Good Administration 'Getting it right' requires a public body to take account of established good practice. The Third Principle requires bodies to be 'Open and accountable' by being open and clear about policies and procedures. Good administration requires that adequate policies, procedures, guidelines and training for staff is in place to give effect to binding obligations.

Finding: The Department failed to establish guidance for staff and an administrative framework for the monitoring of the Airport's compliance with its obligation under the 2008 Planning Agreement. I consider this failing to constitute maladministration.

52. The Department has not initiated enforcement action against the Airport in respect of late flights. Further, there are no records of deliberations and consideration of examination of the extension logs provided from 2011 by the Airport to the Department. These records would provide reasons to explain and justify the Department's failure to act in relation to this aspect of the 2008 Planning Agreement. The Department was aware that stakeholders had a significant interest in the Airport and must have anticipated that its action (or inaction) would require explanation. Recording of discussions and considerations is a key tenet of good administration, and a 'shield' for a public body to defend its actions when challenged. I consider the Department's failure to keep written records in relation to decisions about the Airport's compliance with the 2008 Planning Agreement is contrary to the Third Principle of Good Administration which requires a public body to be 'Open and accountable' by keeping proper and appropriate records and giving reasons for decisions.

Finding: The Department failed to keep written records relating to decisions about compliance of the 2008 Planning Agreement. I consider this failing to constitute maladministration.

Injustice to the complainant

53. As a consequence of the maladministration I have identified in relation to this issue of complaint, I am satisfied that BCAWL suffered the injustice of outrage, frustration and uncertainty. I will address the issue of a remedy for this injustice later in this report.

Issue 2: The Department's handling of the BCAWL's complaint

Detail of the Complaint

54. BCAWL complained of the inadequacy of the response to their letter of 13 November 2015. They also complained about the delay in receiving a reply to

this letter. They also believe the Department's attitude and approach to be negative and dismissive as revealed by the content of letters of 17 June and 16 September 2015.

Evidence considered

55. In response to my investigation enquiries I have established the following chronology in relation to the Department's complaint handling:

- 8 June 2015:** Letter of complaint from BCAWL to the Department;
- 11 June 2015:** The Department acknowledged of BCAWL's complaint. The correspondence enclosed the Department's complaint's policy and advised BCAWL that the complaint was being treated as a stage one complaint and would be forwarded to the Strategic Planning Division;
- 17 June 2015:** The Department responded to BCAWL's stage one complaint;
- 5 August 2015:** BCAWL submitted a further complaint which was considered as a stage two complaint;
- 16 September 2015:** The Department's response to BCAWL's stage two complaint was to signpost to the Ombudsman;
- 22 October 2015:** BCAWL submitted a further letter to the Department;
- 6 November 2015:** In response the Department confirmed it had nothing further to add to its response and advised BCAWL how to proceed;
- 13 November 2015:** By letter BCAWL queried certain issues with the explanation relating to the definition of 'exceptional circumstances' and the Department's investigation of late flight arrivals;
- 18 November 2015:** The Department acknowledged 13 November 2015 letter;
- 8 December 2015:** The Department informed BCAWL by letter that it had nothing to add to its position as set out in previous responses.

56. I have examined all correspondence at stage one and stage two of the Department's complaints process.

57. In investigating this issue I have considered the Department's complaints policy. This policy is entitled 'Making a Complaint about Planning: A guide to our Complaints Procedure'. The relevant extracts state:

'Formal Stage 1

If you wish to make a formal complaint, you should put this in writing to the relevant Planning Manager in the Area Offices or in Strategic Planning Division. The Manager will investigate your complaint and will respond to you within 15 working days

Formal Stage 2

Following the response from the Manager (stage 1), you can write to the relevant Director who will review your complaint and respond directly to you.

In these formal stages we shall:

Acknowledge your complaint within 3 working days of receipt; and

Aim to provide a full reply within 15 working days

Our commitment

In all cases we will: deal with your complaint promptly, investigate your complaint fully and fairly;

Provide a full explanation of the circumstances; and seek an early resolution and, if we are at fault, issue an apology and remedy the situation where appropriate'.

Investigation Analysis and Findings

58. I have considered this issue of complaint in relation to both the timeliness and content of the Department's responses. I note that BCAWL have been in correspondence with the Department on the issue of enforcement action for a number of years. However my investigation examined only the Department's handling of the formal complaint from June 2015 (the first stage of the Department's complaint process).

59. I note that the Department responded to BCAWL's letter of 13 November 2015 on 8 December 2015. The Department commits to respond to complaints

correspondence within 15 working days (paragraph 57 refers). From the available evidence, I am satisfied that the response was timely and in accordance with the Department's complaints procedure. I also note that the Department's responses to the first and second stage complaint were timely (paragraph 55 refers). **Therefore I have not upheld this element of BCAWL's complaint.**

60. I refer to the Department's response at stage one of its complaints process dated 17 June 2015. I note that comments such as 'thank you for your letter', 'as you are aware', 'stressed the importance of doing everything possible', 'I can assure you', 'the situation will be kept under review' and 'I acknowledge that you remain unhappy' are recorded in that response.
61. I refer to the Department's response at stage two of its complaints process dated 16 September 2015. I note comments such as 'thank you for your letter,' 'I am sorry that you are unhappy with the response', 'you are correct in stating' and 'The Department is fully committed to the ongoing process' are recorded. These comments are courteous and demonstrate a customer focus as required by the Second Principle of Good Administration. I cannot conclude that the Department's responses were negative as claimed by BCAWL. **Therefore I have not upheld this element of complaint.**
62. BCAWL by letter of 8 June 2015 to the Department refers to '*Lord Bingham's construction of the phrase to be exceptional, a circumstance need not be unique, or unprecedented or very rare, but it cannot be one that is regularly, or routinely, or normally encountered*'. I note that the Department does not specifically refer to this in its response of 17 June 2015. BCAWL again refers to Lord Bingham's construction in their stage two complaint letter of 5 August 2015. The Department again does not specifically refer to this definition in its response of 16 September 2015 to BCAWL. I consider the Department ought to have addressed its views on this definition or in the alternate provide an explanation as to why it did not consider this definition to be relevant.

63. I also note that in BCAWL's stage one complaint letter (8 June 2015) it refers specifically to delays by a particular airline. BCAWL state that '*with regard to Operator A delays, of which were 149 in this period [1 April to 31 October 2014], the aircraft technical reason was quoted on 118 occasions. We contend that an excuse used on 79.9% of delays for one operator could not be deemed exceptional; rather it could almost be considered the norm*'. I note that the Department does not address this point specifically in its response of 17 June 2015 to BCAWL. I also note the brevity of the Department's response of 8 December 2015 to BCAWL's letter of 13 November 2015. In light of this, I can understand why BCAWL asserts that the Department were dismissive in its responses of 17 June 2015 and 16 September 2015.
64. 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. I find that the Department did not meet these standards in addressing BCAWL's complaint. **I have upheld this element of BCAWL's complaint in relation to the content of the responses.**

Finding: The Department failed to investigate BCAWL's complaint thoroughly and provide adequate responses to concerns raised. I consider this failing to constitute maladministration.

Injustice to the complainant

65. I am satisfied that BCAWL suffered the injustice of frustration and uncertainty due to the unsatisfactory manner in which the Department dealt with its concerns. BCAWL also suffered the injustice of time and trouble in bringing their complaint to my Office to obtain an independent investigation of the issues.

CONCLUSION

66. I received a complaint on behalf of BCAWL regarding the actions of the Department in relation to George Best Belfast City Airport. BCAWL complained that the Department failed to enforce the 2008 Planning Agreement between it and the Airport. BCAWL also complained about the Department's handling of its complaint. Although BCAWL also complained about alleged 'abuse' by the Airport in relation to flight times I am unable to investigate these issues as the Airport is not a body in my jurisdiction.
67. The investigation of the complaint has identified the following instances of maladministration by the Department:
- The Department failed to establish an operational definition of the phrase 'exceptional circumstances' for the purpose of monitoring the Airport's compliance with the 2008 Planning Agreement;
 - The Department failed to collect data on a regular and systematic basis on late flight movements from 2008 to 2011 for the purpose of monitoring the Airport's compliance with the 2008 Planning Agreement;
 - The Department failed to establish guidance for staff and an administrative framework for the monitoring of the Airport's compliance with its obligation under the 2008 Planning Agreement;
 - The Department failed to keep written records relating to decisions about compliance of the 2008 Planning Agreement; and
 - The Department failed to investigate BCAWL's complaint thoroughly and provide adequate responses to concerns raised.

BCAWL have asked that there is a reduction in late flights at the Airport by way of a remedy for their complaint. The Airport is not a listed authority in my jurisdiction. In any event I am unable to provide a remedy of this nature.

68. However, having regard to all the facts and circumstances of this case and the nature and extent of the injustice sustained by BCAWL in consequence of the maladministration I have identified, I recommend to the Department that:

- A payment in the amount of £1000 by way of a solatium together with an apology to BCAWL is necessary to effect a fair settlement of the matters complained of. This payment reflects the injustice of frustration, outrage and uncertainty relating to the Department's action pursuant to the 2008 Planning Agreement. It also reflects the injustice of frustration and uncertainty about the complaint handling and time and trouble in pursuing the complaint. The Department should provide the apology and payment within one month of the date of this report.

69. I also recommend that:

- The Department should forthwith enter into discussions with the Airport with a view to establishing an operational definition of 'exceptional circumstances'. The Department should provide this Office with an update on the progress of these discussions within three months of the date of this report. Where the Department and the Airport establish an agreed operational definition of 'exceptional circumstances', the Department should establish an administrative framework and operating procedures for analysing data, record keeping and recording reasons for decisions, for the purpose of monitoring the 2008 Planning Agreement.
- In the absence of an agreement with the Airport on the operational definition of 'exceptional circumstances, the Department should establish guidance on the meaning of exceptional circumstances for use by its staff. The guidance should then be used as part of the Department's administrative framework to monitor the 2008 Planning Agreement. This framework should also include operating procedures for analysing data, record keeping and recording reasons for decisions. The Department should provide this Office a copy of the guidance, administrative framework and operating procedures within nine months of the date of this report.

- The Department provide training to ensure that relevant staff are aware of the importance of responding to complaints in an effective manner. The Department should provide an update within three months of the date of this report to ensure this recommendation has been implemented. This should be supported by evidence to confirm that appropriate action has been taken.

Marie Anderson

MARIE ANDERSON
OMBUDSMAN

February 2018

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.