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Report prepared pursuant to Recommendation Three of the Northern Ireland Audit Office's *Extraordinary Audit of Causeway Coast and Glens Borough Council (7 July 2022)*

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Introduction

1. I have been asked by Causeway Coast and Glens Borough Council (hereafter: “CCGBC”) to prepare a report pursuant to Recommendation Three of the Northern Ireland Audit Office’s *Extraordinary Audit of Causeway Coast and Glens Borough Council* (7 July 2022). The Extraordinary Audit had been carried out at the direction of the Minister for Communities given her concerns about the management of land disposals and easements within CCGBC, aspects of which had earlier drawn censure in the High Court’s ruling in [Re Allister’s Application \[2019\] NIQB 79](#). The Audit found shortcomings at a number of levels of governance within CCGBC and, at Recommendation Three, addressed the issue of record keeping as a necessary support for decision-making. It read:

“The findings in this report have identified a number of failings in relation to record keeping, particularly around key matters demonstrating compliance with legal and accountability requirements. The Council should carry out a review of its procedures to ensure adequate records are used to support decision making”.

2. I was initially approached by CCGBC to provide training on the legal principles that govern record keeping and, thereafter, to prepare this report. In doing so, I have liaised closely with CCGBC’s Data Protection Officer, [REDACTED], who has provided me with access to a wide range of documentation in CCGBC, as well as to officers with experience in decision-making and record keeping.
3. The Terms of Reference for my report (see Appendix One) centred upon four main tasks, which can be summarised as follows:
 - i. That I review CCGBC’s existing records management policies, procedures and practices, controls currently in place, documentation used, resources allocated to record keeping, and records management, etc. I should here examine the adequacy and appropriateness of current policies, procedures and practices vis-à-vis CCGBC’s legislative duties and the requirements of best practice.
 - ii. That I make proposals for improvements to existing policies, procedures and practices having regard for the failings identified in the NIAO Extraordinary Audit Report, to ensure that CCGBC adopts best practice in relation to record keeping and records management.
 - iii. That I identify the connection between CCGBC’s legal obligations and its practices, in order to support more effective decision making. This should include consideration of appropriate mechanisms through which CCGBC can underscore the individual responsibility of CCGBC officials and, in turn, develop an improved good record keeping culture. I should under this head clarify the roles and responsibilities for all

officers in relation to record keeping; consider CCGBC's legislative framework including relevant principles of public law and human rights law; and clarify the link between the legislative framework with CCGBC's practices.

- iv. That I set out practical proposals for record keeping and record management arrangements to ensure CCGBC addresses the failings highlighted within the NIAO Extraordinary Audit Report and that CCGBC is compliant with the record keeping practices required of a local authority. This could include methods of recording decisions and key matters discussed in meetings, telephone conversations, e-mails, etc., documenting the reasons for decisions, and how to save records in a structured/managed way so they can be easily retrieved.
4. In working within these Terms of Reference, I have used a methodology that has focused upon the examination of documents currently held by CCGBC (both in hard copy and online) and discussions through meetings and a focus group (including the above-mentioned training on legal principles). I have also had in mind that the key words in Recommendation Three of the Extraordinary Audit are "*legal and accountability*" requirements, which I note in more detail, and by way of definition, at paragraph 9 below). The Extraordinary Audit also makes mention of the language of "*governance*", but I understand that CCGBC has commissioned a further report in light of Recommendation One in the Extraordinary Audit, which reads: "*An independent Council-wide review of governance arrangements should be carried out immediately to ensure that significant weaknesses highlighted in this report are addressed*". In preparing my report, I have thus avoided any overlap with the language of "*governance*" – not least because it is not a term that is frequently used by the courts and/or statutes that impose duties on CCGBC.
5. My conclusions and recommendations are found at paragraphs 42-44, below. They centre upon, what I consider to be, achievable ways to embed awareness of legal requirements within CCGBC. Some of them will have resource implications for CCGBC; others should require only a modification of existing policies and practices.
6. I structure my report as follows. In the next section, I note a three-way typology of CCGBC's legal responsibilities, where I reference: (i) judicial review; (ii) overarching information schemes contained in, most prominently, the Freedom of Information Act 2000 and the Data Protection Act 2018; and (iii) the suite of Council specific legislation that applies in Northern Ireland. I next identify the key points in the High Court ruling of 2019 and the Extraordinary Audit, before outlining the content of the documents that I examined and the discussions that I had within CCGBC. I elaborate upon my recommendations in a section titled "Conclusions and Recommendations"; and I exhibit some related information about my report in a number of Appendices.
7. I would also emphasise at the outset that I have written this report in my capacity as a member of the independent Bar of Northern Ireland. While I am also employed on a part-time basis at Queen's University Belfast – I am Professor of Public Law in the School of Law – I was invited to write this report from the perspective of a legal practitioner. I can confirm that, in

doing so, I have been allowed to act in a wholly independent manner and that all the recommendations in the report are my own. I can also confirm that I have had no conflict of interest when compiling the report: I have solely professional relationships with officers in CCGBC, and I am not a member of any political party in Northern Ireland or elsewhere in the United Kingdom.

CCGBC's Legal Duties

8. I have suggested that CCGBC's legal duties can best be conceived of in terms of a three-way typology centred upon: (i) judicial review; (ii) information law; and (iii) Council related, statutory schemes. Whilst there will often be an overlap between these headings, they seem to me to provide a helpful means of contextualising how “*legal and accountability*” requirements can be manifest in practice. They also provide useful headings for explaining why good practices in record keeping are germane to all aspects of CCGBC's work.
9. Before turning to these areas, I should clarify what I understand to be the relationship between the words “*legal*” and “*accountability*”. While Recommendation Three of the Extraordinary Audit seems to read them conjunctively, I am of the view that the relationship between them is more nuanced and should be positioned as such. In short, whilst the law is a means to ensure accountability in public decision-making, actions against CCGBC – or certainly those that come before a court – must focus on established *legal principles* and causes of action. I have thus focused my efforts on matching CCGBC's practices etc to those principles – accountability through the courts may then follow where some or other aspect of CCGBC's practices fall short of one or other legal principle.
10. I would add that courts are not (of course) the only means through which accountability might be achieved. For instance, the Extraordinary Audit itself is one example of how political direction can hold bodies such as CCGBC to account, as that Audit has led to the current process of revision and review under Departmental oversight. I would also reference the role that can be played by the Public Sector Ombudsman, which focuses on “*maladministration*” and can make recommendations about the need for redress to individuals. While the concept of “*maladministration*” is different from that of “*illegality*” – only a court of law can rule on the latter – the Ombudsman can still examine CCGBC's actions and inactions with reference to the so-called “Crossman catalogue”. That catalogue include arbitrariness; bias; delay; inattention; incompetence; ineptitude; neglect; perversity; and turpitude – many of which descriptors could be used to describe poor record keeping.

(a) Judicial review

11. Judicial review is, broadly speaking, the procedure through which the High Court supervises the decisions of public bodies that are exercising statutory powers, performing public duties, and/or acting in relation to matters of public interest (see [Re Wylie's Application \[2005\] NI 359, 362, para 7](#)). While the judicial review procedure is to be used only where an individual has no other remedy – see paragraph 28 below – it is a particularly high-profile form of proceedings that can touch upon matters of political controversy. The primary focus in judicial review is on the “*legality*” of a public body's actions and inactions, which is shorthand for asking whether the public body has correctly understood the law that governs its powers and duties. “*Legality*” is not, however, the only ground for challenging a public body's decisions,

and the case law often also refers to “*procedural fairness*” and “*irrationality*”. The Human Rights Act 1998 can also be relevant and, when it is, decisions can be challenged as “*disproportionate*”.

12. In terms of record-keeping, there are five points to note about judicial review.
13. The first point concerns the duty to give reasons for a decision, which can arise either from the terms of a statute or be implied by the courts. Where there is a duty to give reasons for a decision – planning law would be an example – those reasons must be “*adequate and intelligible*” so that an individual can decide whether he or she would wish to challenge a decision (see [Dover District Council v CPRE Kent \[2017\] UKSC 79, \[2018\] 1 WLR 108](#)). Strong and consistent record keeping will plainly assist a public body that is legally required to explain to an affected individual why it has taken the decision at hand.
14. The second point concerns the importance of pre-action correspondence. According to [Judicial Review Practice Direction 03/2018](#), an individual who wishes to challenge the decision of a public body must first write to the body in question, identify the matter in dispute, invite the public body to (for instance) retake a disputed decision, and request any information that the individual thinks is relevant to the dispute at hand. The body in question is, in turn, required to reply in writing, and a high standard of record keeping will plainly enable it to do so in an efficient and informed way. Moreover, while the body need not necessarily disclose all the information that is requested by the individual – there are finely balanced matters of judgement at the pre-action stage – a strong record of the decision-making at hand can allow a robust and informed decision about disclosure to be made. Strong, evidence-based reasoning at this stage can therefore be very effective and even lead an individual to decide not to proceed to Court.
15. The third point concerns the potential for an overlap between a pre-action request for disclosure of documents under the *Judicial Review Practice Direction* and a request for those same documents under the Freedom of Information Act 2000 (see, eg, [Re CAJ's Application \[2015\] NIQB 59](#)). There is nothing in the judicial review procedure to prevent a parallel request for information being made under the Act of 2000, and the need for robust record keeping thus follows not just from the prospect of judicial review but also the Act of 2000 itself. Public bodies such as CCGBC should therefore be alert to the fact that parallel requests can be made and ensure that they are answered in a compatible manner. Inconsistent answers can be suggestive of poor record keeping or, at the very least, an absence of joined-up decision-making at an organisational level.
16. The fourth point concerns the preparation of evidence in the event that legal proceedings are brought against a public body. In short, officers within that body may be required to prepare and swear evidence that explains why a particular decision was taken (this is typically done by way of affidavit evidence in judicial review proceedings, i.e., oral evidence is given only exceptionally). While the nature of the evidence that must be prepared will always depend on the facts of a case and its fuller context, a public body must be able to adduce evidence that can trace a decision from the very start of a decision-making process through to its terminus

(the High Court, in *Allister*, touched upon this point on a number of occasions). It should also be noted in this context that public bodies have a “*duty of candour*” to the High Court whereby they must provide to the Court all evidence which is relevant to the matters before it. An inability to do so because of poor record keeping might be expected to draw judicial censure and could potentially cause reputational harm to the body in question: see [R \(HM, MA and KH\) v Secretary of State for the Home Department \[2022\] EWHC 2729 \(Admin\)](#).

17. The fifth point concerns the relationship between the evidence that is presented by a public body and the grounds for review. As above, judicial review centres upon the four main grounds of legality, irrationality, procedural fairness, and proportionality, and coherent evidence can be the key to defending a challenge based upon any of those grounds. The point can perhaps be seen most obviously in relation to the above point about the duty to give reasons: if an individual claims that a public body has breached its duty, clear and consistent evidence about how the disputed decision was taken and communicated would place the body in a theoretically strong position to defend a challenge.

(b) Information law

18. I have used the term “information law” as shorthand for three pieces of legislation that are central to CCGBC’s duties in this area: the [Freedom of Information Act 2000](#); the [Environmental Information Regulations 2004](#); and the [Data Protection Act 2018](#) (as is to be read with the UK General Data Protection Regulation). Each of these pieces of legislation provide, in different ways, for persons to apply for information that is held by CCGBC, where an individual’s right of access to information about him or herself is governed by the Data Protection Act 2018. Requests by individuals for access to other forms of information will be made under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, where decision-making about disclosure is linked to a range of statutory exemptions. All three legislative schemes impose duties on public bodies to take active steps to observe and give effect to the relevant principles of information law.
19. The body of law that applies under these legislative schemes is very wide in its scope, and I would refer to the discussion of the relevant principles in [Philip Coppel \(ed\) Information Rights](#) and on the [Information Commissioner’s webpage](#). For the purposes of this report, I would make three points about the legislation and the importance of record keeping.
20. The first point concerns the need for all information to be recorded and processed in accordance with the requirements of the legislation. This is, of course, an enormous task for public bodies, and I am aware that CCGBC has already produced a wide range of documentation that provides guidance on the applicable rules. Particularly challenging in this context is the Data Protection Act 2018, which fastens upon a number of principles that have implications for, among other things, the retention of data. While the question of how such data is processed/stored perhaps belongs in a report on governance, I have noted it here as I

have considered closely CCGBC's guidance on its obligations under information law. I make a number of observations about that guidance at paragraph 37 below.

21. The second point concerns reliance upon exemptions when refusing requests for information, where the Freedom of Information Act 2000 is the most obviously relevant scheme. The starting point under the Act is that any person is entitled to be informed in writing by a public authority whether it holds information of the description specified in the request (the so-called "*duty to confirm or deny*") and, if so, to have that information communicated to them. Refusals of requests – or to confirm or deny that an authority holds the information in question – may then be made on the ground that the information is governed by a provision of the Act which confers either an "*absolute*" or a "*qualified exemption*" (where reliance upon a qualified exemption is to be decided in the light of a "*public interest*" test). The law on the exemptions can become complicated depending on which exemption is being applied, but the point to be noted is that, where a public body wishes to rely upon an exemption, it should create a clear record of the process leading to refusal. That record could be relied upon later when seeking to justify the refusal, should a challenge to it be brought.
22. The third point concerns the process of challenging decisions about information law. While points of information law can sometimes be raised in judicial review proceedings, the basic position is that an individual should use the remedies that are provided for in the Freedom of Information Act 2000 or the Data Protection Act 2018 (as appropriate). In broad terms, those remedies start with complaints to the Information Commissioner, where court proceedings can thereafter be brought in the Information Tribunal and, on appeal, to the High Court. For CCGBC, the need to have a detailed record of decision-making will be important in at all of those stages, as it should be able to justify and defend its decision-making throughout the information appeals process. It should also be noted that the principles that will be applied by the High Court under the Acts will be broadly similar to those that apply in judicial review proceedings, and that privacy rights and proportionality under Article 8 of the European Convention on Human Rights can be particularly important under the Data Protection Act 2018.

(c) Council related, statutory schemes

23. Judicial review and information law are undoubtedly the most high-profile areas in which CCGBC works – a point that is true of all local councils in Northern Ireland. However, having spoken with officers within CCGBC, it has been impressed upon me that the Council and its officers most typically work with reference to statutory schemes that do not immediately touch upon judicial review and/or information law. I was for these purposes provided with a very helpful list of the legislation that governs CCGBC's work, which reveals the true extent of the legal obligations under which CCGBC and its officers must operate. I have exhibited that list at Appendix Two of my report.
24. I would make four points under this heading.

25. The first concerns the Local Government Act (Northern Ireland) 2014 which, when read with the Local Government Act (Northern Ireland) 1972, is of foundational importance to local government. By section 2 of the Act of 2014, CCGBC is required to prepare and keep up-to-date [a constitution](#), which delimits, among other things, its decision-making structures and procedures for decision-making. The need for accurate and complete record keeping is emphasised by Part 8 of the Act of 2014, which governs access to meetings and documents, including meetings of sub-committees. I would note, parenthetically, that the Act also establishes a [Code of Conduct for Councillors](#), which is subject to the oversight of the Local Government Commissioner of Standards (see, eg, [Re Bunting \[2019\] NIQB 36](#)). The Code includes, among the standards that must be observed, the Nolan Principles of Public Life – selflessness; integrity; objectivity; accountability; *openness*; honesty; and leadership (emphasis added).
26. The second point concerns the general power of competence under section 79 of the 2014 Act, which reads: “(1) *A council has power to do anything that individuals generally may do*”. Insofar as this implies that CCGBC is to be viewed as the equivalent in law as a natural or legal person, the section should be treated with some caution. Not only does CCGBC have record keeping obligations that go beyond those of individuals (albeit companies will have record keeping obligations for reasons associated with liabilities); it is also subject to the provisions of the Human Rights Act 1998. That Act – which applies only to public authorities – prohibits CCGBC from acting in a manner which is incompatible with an individual’s rights under the European Convention on Human Rights. Once again, accurate record keeping would assist CCGBC in the event that it is faced with a claim that it has acted contrary to a person’s rights.
27. The third point concerns the importance of following procedural requirements that are specified in legislation and maintaining a detailed record of having done so. The point could be illustrated with reference to many of the pieces of legislation that govern CCGBC’s work, but the example that will be used here is Part 7 of the [Clean Neighbourhoods and Environment Act \(Northern Ireland\) 2011](#). That Part of the Act governs Council actions in the context of statutory nuisances, where, *per* section 64, “*It shall be the duty of every district council ... (b) where a complaint of a statutory nuisance has been made to it by a person living within its district, to take such steps as are reasonably practicable to investigate the complaint*”. In the recent case of *Re McAleenon’s Application* [2022] NIQB 39, Humphreys J made mention of the extensive records that had been kept by Lisburn and Castlereagh City Council officers in the context of it investigating complaints about a statutory nuisance emanating from a landfill site. He dismissed the application for judicial review against the Council.
28. The fourth point concerns remedies or, to put the point differently, the manner in which CCGBC decision-making may be challenged. While judicial review may sometimes be the appropriate forum – planning disputes are often heard that way, as in *Allister* – the legislation that governs CCGBC’s decision-making will often provide for a specific right of appeal. An example here is in [section 67 of the Houses in Multiple Occupation Act \(Northern Ireland\) 2016](#), which governs appeals to the County Court in relation to a range of decisions about

licensing for so-called “HMOs”. It is to be noted that, where such a right of appeal exists, it ought ordinarily to be used by the individual and that there may, in turn, be a further right of appeal to the High Court or Court of Appeal. In any event, CCGBC’s capacity to defend any such challenges will be enhanced by the creation and retention of a strong record of how and why a particular decision was taken.

Allister and the Extraordinary Audit

29. I turn now to consider some of the points arising from the High Court ruling in *Allister* and the findings in the subsequent Extraordinary Audit. I would emphasise that my purpose in doing so is not to repeat wider points of which CCGBC will already be aware, but to isolate more specific points that were made about record keeping in the context of legal responsibilities. I took those as the starting point for my inquiries for the purposes of this report, as are chronicled in the next section. They are also relevant to the recommendations that I make in the final section.

Re Allister

30. The challenge in this case was brought to CCGBC's decision to grant planning permission for a hotel complex within its district, where one of the central issues was the disposal of an easement. The judgment of the Court, which ran to some 120+ pages, found that the grant of planning permission was vitiated by multiple public law failings: (i) procedural unfairness whereby a registered objector had had insufficient time to consider and respond to documents latterly released under the Freedom of Information Act 2000; (ii) a failure to adhere to the protocol that governs reporting for site visits by CCGBC's planning committee; (iii) breach of a local planning policy; and (iv) a failure to conduct all necessary assessments when completing an environmental impact assessment. The Court granted the application for judicial review and quashed the impugned decision.

31. The Court made a large number of observations and statements about record keeping within CCGBC, including about the reliability of information and the processing of requests under the Freedom of Information Act 2000. I understand that CCGBC has already considered closely the criticisms that were made by the Court, and I do not add any substantive comment to those here. I would, however, highlight the following paragraphs of the judgment as relevant to the question of how CCGBC might improve its future standards of record keeping:

- i. Paragraph 32. This notes, among other things, that the record for some meetings did not identify those who had been in attendance and, in one instance, that the identities of persons who had been in attendance had been deleted.
- ii. Paragraph 68. The Court here noted, among other things, that affidavit evidence sworn in relation to a vote in the planning committee did not explain the reasons for the vote. The absence of any such explanation factored into the Court's finding that there had been procedural unfairness. (Mr Allister had requested further time to consider information received under the Freedom of Information Act 2000 before the Committee would make its decision: the vote had rejected that request.)
- iii. Paragraph 70. The Court noted that there had been "*certain inconsistencies*" between Council affidavits which had been sworn in the case.

- iv. Paragraphs 71-72. The Court indicated that CCGBC's planning committee had not been given all documentation relevant to the decision it was to take.
- v. Paragraph 83. Reference is here made to the need for "*scrupulous and timeous observance of the citizen's FOI rights*".
- vi. Paragraph 89. The Court noted a failure to produce a report in accordance with the planning committee's site visit protocol, and also to present some information to the planning committee.
- vii. Paragraphs 125-126. The Court referenced CCGBC's duty to take all material considerations into account and that that duty had been breached by the failure to bring to the planning committee's attention all relevant information.

Extraordinary Audit

32. I have already noted at paragraph 1 above that the Extraordinary Audit was ordered by the Minister for Communities given her concerns about the management of land disposals and easements within CCGBC, including that which had drawn censure in *Re Allister*. Much of the corresponding report focuses specifically on issues of land management, and I understand that CCGBC has commissioned a further report into the findings and recommendations on those issues. For the purposes of my report and Recommendation Three, I would simply highlight that the Extraordinary Audit confirmed that the failings identified in *Re Allister* were more widespread than on the specific facts of that case. The report of the Extraordinary Audit thus makes frequent mention of "*inadequate records*" being created and of "*inadequate information*" being presented to Committees. Recommendation Three, as reproduced at paragraph 1 above, focuses on the need for improved standards of record keeping as a precursor to legally sound decision-making.

Actions Pursuant to Terms of Reference

33. The request that I assist CCGBC consisted of two parts: (i) that I provide training on the principles that govern record keeping; and (ii) and that I prepare this report. As will be seen below, I have factored that training into my report and recommendations as, had I not been asked to provide such training, that would have been among my first recommendations. The clear implication of *Allister* is that senior council officers need to be more familiar with the rudiments of judicial review, of their potential obligations when preparing and swearing evidence, and with the scope for cross-over with information law. Training is, of course, one obvious way to provide that knowledge and, moving forward, I recommend that “update” training is provided for senior officers on an annual basis (see paragraph 44(i) below).
34. The training that preceded the preparation of this report was delivered at two sessions held at CCGBC on 7 October 2022 and 17 November 2022 (a list of attendees is contained in Appendix Three). The sessions started by considering the significance of “*legal and accountability*” requirements from the perspective of “*legal*” and “*other*” routes to accountability (copies of the slides for the sessions are contained in Appendix Four). Discussion also centred upon the role of the Nolan principles of Standards in Public Life and the particular responsibilities of officers who work under CCGBC’s scheme of delegation. When looking at legal principles, discussions focused upon the grounds for judicial review that have been noted at paragraph 11 above, and which include human rights law. Officers in this context examined record keeping as something that is potentially (very) relevant to evidence for legal proceedings, where affidavit evidence in judicial review (as in *Allister*) was discussed as a paradigm example. The importance of records for other sorts of actions – civil claims, for instance where the actions of more junior staff might be in issue – was also canvassed.
35. The three-way typology of CCGBC’s legal duties that I have used throughout this report was developed after these training sessions. The sessions had given rise to a number of questions about information law and, as I have already noted at paragraph 23 above, officers also made the point that most CCGBC work occurs within largely discrete statutory frameworks, such as relate to, for instance, environmental health, or health and safety more generally. Bearing in mind my terms of reference, I concentrated my inquiries on CCGBC’s approach to information law and an awareness of the need for record keeping under discrete statutory schemes. I was mindful, when doing so, that each of those areas could still have points of cross-over each other and with judicial review and that they should not be viewed in strict isolation.
- [the Data Protection Officer]
36. In terms of information law, I understand that [REDACTED] – whom I mentioned at paragraph 2 above and with whom I have liaised throughout the process of preparing this report – is the only designated data protection officer within CCGBC, having assumed her position in mid-2022. Bearing that point in mind, I examined CCGBC’s information procedures and policies over two stages.

37. The first stage involved a detailed consideration of written procedures and policy documents.

I started my inquiries here by considering two extensive lever-arch files of documents that were provided to me by [REDACTED]. These contained a wide range of policy documents and guidance both in relation to freedom of information (including the Environmental Information Regulations) and data protection. I would make the following points about the documents:

- i. All of the standard areas of information law appear to be addressed in the documents. Some of this documentation has been created by CCGBC itself, while some other documentation has been borrowed from the Information Commissioner's extensive online guidance. Documents include: general guidance on the Freedom of Information Act 2000; a definition of "public task" for the purposes of CCGBC's work; internal documentation about employee rights when requests about information are made under the Freedom of Information Act 2000; detail about the publication scheme that CCGBC is required to produce under the Freedom of Information Act 2000; guidance on the nature of the Environmental Information Regulations; guidance on the exemptions that apply under the Freedom of Information Act 2000 and the related public interest test; guidance on data retention and disposal; guidance on data protection; guidance on the use of CCTV footage; policies on the Data Protection Act 2018 (but see point (iii) below); guidance on what should be done if there is a data security breach; guidance on privacy notices; guidance on data sharing; and details about training that has previously been undertaken both in relation to the Freedom of Information Act 2000 and Data Protection Act.
- ii. The above documentation is so voluminous as to appear, at times, to lack a coherent structure. I accept that, at one level, this is the inevitable consequence of seeking to provide guidance and adopt policies in an area of law that is very broad in its reach and which, in some respects at least, is highly complicated. However, on reading the documentation, I did wonder how easily a member of staff might access records were he or she to (for example) receive a request under the Freedom of Information Act 2000 and wish to know how to process it. In this regard, I requested, and was granted, access to the staff portal on CCGBC's website, but I found the information available to me there to be limited. Indeed, it did not appear to me to carry any information over and above that which is available through the public facing part of the website under the heading: "[Access to Information](#)". I thus have a query about where the guidance documents etc are stored within CCGBC and how accessible it is to officers.
- iii. Some of the above documentation is out-of-date. I noticed, on reading through the files that had been sent to me, that much of it still refers to the Data Protection Act 1998, rather than the Act of 2018. While I accept that not much may turn on this in reality, it does suggest that an updating of documentation in the light of key developments may not have happened. This is not wholly insignificant, in my view, as a failure to keep pace with legal changes can lead to later errors in record keeping, and that, in turn, could potentially cause problems when responding to inquiries, complaints, etc.

- iv. CCGBC’s publication scheme. This is available through the public-facing part of the website. It contains links to a number of other webpages relevant to CCGBC’s work but is described as being “*in draft*” and, once opened, as having been prepared pursuant to the Freedom of Information Act 2002. It is my understanding that, whilst such schemes have an iterative nature, they are to be adopted with a view to possible change rather than existing “*in draft*”. The reference to the Freedom of Information Act 2002 is also wrong: whilst Scotland has an Act dating from that year, the relevant legislation as applies in Northern Ireland is that of 2000. A proof-reading of the CCGBC webpage should allow such errors (minor though they are) to be expunged from public view.

38. Having read the above documentation, I sought additional information on how far – it at all – questions of data management and record keeping feature as part of staff induction in CCGBC. I was provided with a Corporate Induction document for this purpose (this does not appear to make specific mention of data, etc) and was also referred to an online iHasco course that staff are required to take (the course is entitled, *GDPR UK: Essentials*). I understand that other such modules are available online – for instance, on the Freedom of Information Act 2000, or GDPR EU – but that CCGCB has not requested access to those.

39. The second stage of examining procedures involved discussions with a focus group, which was convened on 6 February 2022. The group comprised officers and employees from across a range of levels and service areas within CCGBC who were advised that their names would not be recorded in this report. Discussions were open and friendly, and I noted the following points about information law:

- i. When asked about the accessibility of information law guidance within CCGBC, there were some inconsistencies of response. Some participants cited the staff portal and suggested that guidance etc was readily accessible through that, while others professed to having some difficulty in locating such documentation.

- ii. There appeared to be a nervousness about processing data and information requests, and the default position seemed to be that difficult (and seemingly any) questions would be referred to [REDACTED]. I understand from other discussions within CCGBC that there are several hundred employees who could potentially receive data and/or information requests, so I note that demands on [REDACTED] time could be very significant.

- iii. Some service areas receive more data and/or information requests than others. Knowledge of the basic rules of information law within the areas that receive such requests is correspondingly higher, and some areas indicated that they had sometimes processed their own replies. However, I was also told that there is no dedicated officer within the relevant service areas who will have first responsibility for requests. Matters, again, ultimately appear to be directed towards [REDACTED] ([REDACTED])

[the Data Protection Officer]

[the Data Protection Officer]

[the Data Protection Officer]
[the Data Protection Officer]

later confirmed for me that she can liaise with CCGBC's legal services about matters of information law and that, if there are issues of particular complexity, external solicitors can be instructed.)

- iv. Several of those present agreed that it would assist their work if there were to be a dedicated information officer within their service area, or certainly an officer who had information law included within their portfolio. I return to the significance of this point at recommendation vi of my report, below.

40. The focus group was also used to consider questions of record-keeping under discrete statutory schemes. I noted the following points from that part of the discussion:

- i. One participant stated that he was aware of differing practices in relation to record-keeping across service areas. While he worked in a service area in which there were very high levels of record-keeping, he understood that his service area was an exemplar. He made this point not by way of criticising other service areas, but to highlight the point of variable practices. This led to a discussion of whether it would be possible for CCGBC to adopt a template for record creation. I was reminded that guidance on record-keeping had already been provided to employees but that there was no template.
- ii. Participants indicated that there had historically been differing practices in terms of how records are stored and secured. I was advised that guidance had been issued on retention and storage and that bespoke training had been provided to Senior Officers within CCGBC in the light of the Extraordinary Audit. I took the question of retention and storage to be one of governance given that the training in question had been delivered separately from mine.
- iii. Participants from different service areas indicated that there were variable practices in relation to the disposal of records. One participant indicated that there was a three-monthly review of retention and disposal in their service area, while another indicated that such a review occurred (at best) on an annual basis. The latter participant explained that this was a consequence of resource pressures within the service area, as existing, real time demands had to be prioritised.
- iv. There was a strong understanding of the importance of good record keeping as a means to defend legal actions against CCGBC. The focus group considered the example of an injury suffered by a person who was lawfully present on one of CCGBC's premises, which were being supervised. The importance of creating a contemporary record of the facts and actions taken was appreciated by all, albeit one participant was unsure of the link between such a record and the requirements of data protection legislation. I was advised that all such records, once created, are uploaded to CCGBC's databases.

41. I should note that the experiences that were recounted at the focus group were largely anecdotal in nature and that they must be viewed in that way. However, I would emphasise that the participants actively engaged in the discussions and offered some very helpful insights into working practices within CCGBC. They also did so in a manner that was helpful and courteous, and I would wish to record my thanks to them.

Conclusions and Recommendations

42. I am conscious that the background to this report was the criticism of aspects of CCGBC's decision-making as were made, first, in the High Court's ruling in *Allister*, and, thereafter, in the report of the Extraordinary Audit. Those criticisms focused upon failings that were fundamental in public law terms, where the High Court found, among other things, that poor record keeping had meant that CCGBC could not have taken all relevant considerations into account when making the decision under challenge in the case. The High Court also found, in terms, that insufficient weight had been given to the importance of the Freedom of Information regime. As the judge noted at paragraph 83 of this judgment, there is a need for "*scrupulous and timeous observance of the citizen's FOI rights*".
43. I have no doubt that the very fact of the High Court's ruling and Extraordinary Audit has already led to very significant changes in practices and policies within CCGBC. In examining those practices and policies against the three-way typology of CCGBC's duties, I have had in mind the need to make recommendations that are relevant and actionable, as well as those that will complement such good practices as already exist.
44. My recommendations are seven-fold:
- i. Senior Officers within CCGBC should have compulsory, annual refresher training on developments in local government law. This could include discussion of case law that is specific to local councils – whether in Northern Ireland or elsewhere in the UK – and developments in judicial review more generally. (I would absent myself from any procurement process given that I have made this recommendation.)
 - ii. CCGBC should ensure that, when a pre-action letter is received about a potential judicial review, there is an internal mechanism to flag-up any related Freedom of Information requests that may have been made, or which are made subsequent to the pre-action letter. Such a system would help to ensure that there is consistency in letters of reply. It would also provide for fuller observance of rights under the Freedom of Information Act 2000.
 - iii. Evidence of best practice in record-keeping should be factored into internal promotion processes within CCGBC, as well as in any processes of appraisal or staff development. Interviews for externally advertised processes should incorporate knowledge of record-keeping as a criterion (presumably essential). The level of knowledge required would depend on the nature of the position at hand.
 - iv. New members of staff at CCGBC should have fuller training on record-keeping, the basics of information law, and their wider legal responsibilities as part of their induction programme. Insofar as this already happens, the mode of induction should be revisited to ensure that it is up-to-date and reflective of best practice (for instance, as has been identified in the training on record keeping that was provided to CCGBC's senior

officers). CCGBC might also subscribe to more online courses for staff and factor completion of those into career review and progression (as relevant to post and responsibilities).

- v. CCGBC should update and streamline its current documentation in the area of information law (both under the Freedom of Information Act 2000 and the Data Protection Act 2018). Core documents should be produced, which are up-to-date and accessible to staff. Documents that are available on the public-facing part of CCGBC's website should be improved. This is notably true of CCGBC's publication scheme for the purposes of the Freedom of Information Act 2000.
- vi. CCGBC should either appoint more officers to hold positions in relation to information law or advertise redefined internal posts that include responsibility for information law. Such positions/posts should be intended to increase the ease with which information requests are processed in CCGBC, where the current Data Governance Officer, [REDACTED], would be responsible for the oversight of policy and operational matters. The positions/posts should also be used to ensure that there is increased uniformity in practice across CCGBC's service areas as regards retention and disposal of records.
- vii. The guidance on record-keeping that has been provided to CCGBC's staff should be elevated to a position of increased prominence. Whilst such guidance is not in the form of a record-keeping "template", increased reliance upon it should help to ensure that consistent principles and practices are being followed across service areas. Any newly appointed information officers should be made responsible for monitoring adherence to the guidance.

Gordon Anthony,
Bar Library,
Belfast

14 February 2023

Appendix One

Terms of Reference for Report

Extraordinary Audit Report – Recommendation 3:

The findings in this report have identified several failings in relation to record keeping, particularly around key matters demonstrating compliance with legal and accountability requirements. The Council should carry out a review of its procedures to ensure adequate records are used to support decision making.

Terms of Reference

1.0 Background

1.1 On 30th November, the Minister for Communities directed the Local Government Auditor to hold an extraordinary audit of Causeway Coast and Glens Borough Council concentrating on land disposals and easements and related asset management policies and procedures.

1.2 On 7th July 2022 the Northern Ireland Local Government Auditor (NIAO) published a report summarising the findings of an extraordinary audit of Causeway Coast and Glens Borough Council, it detailed the findings and recommendations emanating from the audit of land disposals and easements since the Council was formed in April 2015. As a result of the issues found the report made a series of recommendations including Recommendation 3, as follows:

“The findings in this report have identified a number of failings in relation to record keeping, particularly around key matters demonstrating compliance with legal and accountability requirements. The Council should carry out a review of its procedures to ensure adequate records are used to support decision making.”

1.3 On 26th July 2022 the Council unanimously resolved to accept all eight of the recommendations contained in the Extraordinary Audit report.

1.4 On 9th August 2022 the Council resolved to approve an Action Plan to implement the recommendations.

2.0 Scope of the Review

2.1 Causeway Coast and Glens Council is subject to an extensive legislative framework in relation to its good record keeping practices. Accompanying and informing this legislative framework are a range of guidance and codes of practice Council should consider and reflect in its actions. The Council can also be challenged by way of judicial review.

2.2 In addition the Council should demonstrate good administrative practice and the “Principles of Good Administration” used by the Northern Ireland Public Services Ombudsman are a useful basis for public bodies to assess whether or not they are providing a service that exhibits good administrative practice.

2.3 In response to Recommendation 3 of the NIAO Extraordinary Audit, the Council will conduct an independent Council-wide review of Council policies, procedures and practices in relation to record keeping and records management, ensuring adequate records are used to support decision making. The review will address the failings identified in the report and will make recommendations for any improvements required by Council.

3.0 Objectives

3.1 The objective of these terms of reference will be to enable the Council to address Recommendation 3 contained within the Extraordinary Audit report, ie:

“The findings in this report have identified a number of failings in relation to record keeping, particularly around key matters demonstrating compliance with legal and accountability requirements. The Council should carry out a review of its procedures to ensure adequate records are used to support decision making.”

3.2 The review will include, but is not limited to:

- A review of Council’s existing records management policies, procedures and practices, controls currently in place, documentation used, resources allocated to record keeping and records management, etc. This review will examine how adequate and appropriate current policies, procedures and practices are in meeting Council’s legislative requirements and best practice objectives in relation to record keeping and records management.
- Make proposals for improvements to existing policies, procedures and practices considering fully the failings identified in the NIAO Extraordinary Audit Report to ensure that the Council adopts best practice in relation to governance, transparency and accountability in record keeping and records management.
- Identify the connection between Council’s legal obligations and its practices in order to support more effective decision making. To include the consideration of appropriate mechanisms through which Council can underscore the individual responsibility carried by Council officials and in turn develop an improved good record keeping culture:
 - clarify roles and responsibilities for all officers in relation to record keeping
 - take account of Council’s legislative framework including the Principles of Public Law and Human Rights
 - clarify the link between the legislative framework with Council’s practices
- Set out practical proposals for record keeping and record management arrangements to ensure the Council addresses the failings highlighted within the NIAO Extraordinary Audit Report and that Council is compliant with good record keeping practices required of a

local authority. This could include methods of recording decisions and key matters discussed in meetings, telephone conversations, e-mails, etc., documenting the reasons for decisions, and how to save records in a structured/managed way so they can be easily retrieved.

4.0 Sources

- 4.1 The sources of information and evidence which the review may draw upon include:
- Extraordinary Audit Report issued by the Northern Ireland Audit Office on 7 July 2022
 - Judgment of McCloskey LJ In the matter of an application by James Hugh Allister and Robert Edwin Agnew for Judicial Review -v- Causeway Coast and Glens Borough Council [2019] NIQB 79
 - Existing Council policies and procedures
 - Code of Conduct for Local Government Employees (Revised January 2021)
 - Relevant guidance to include that of the ICO, Northern Ireland Public Services Ombudsman, Public Records Office for Northern Ireland, Code of Practice on the Management of Records issued under section 46 the Freedom of Information Act 2000
 - Interviews with Council officials.
 - Sample of work from Council officials in order to demonstrate current record keeping practices within Council.

5.0 Appointment

- 5.1 The appointment of the Reviewer will be made with the agreement of the Department or by an appointment process.
- 5.2 The Reviewer will present a report directly to Council.
- 5.3 Support during the review process will be provided by the Head of Policy and Community Planning and the Data Protection Officer/Information Governance Officer.
- 5.4 The Reviewer may need to undertake engagement with significant stakeholder groups, (which can include but are not limited to) Elected Members, Council officers, other statutory bodies and stakeholders as required.

6.0 Timescale

- 6.1 The Review will be completed and presented to Council by [date TBC] 2022.

Appendix Two

List of Main Legislation under which CCGBC Works

Environmental Services:

- Anti-social Behaviour (Northern Ireland) Order 2004
- The Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985
- Building Regulations (Northern Ireland) Order 1979
- Building Regulations (Northern Ireland) 2012
- Burial Grounds Regulations 1992
- Byelaws made by Causeway Coast and Glens Borough Council pursuant to Section 90
- Local Government Act (NI) 1972
- Caravans Act (Northern Ireland) 1963
- Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991
- Cinemas (Northern Ireland) Order 1991
- Clean Air (Northern Ireland) Order 1981
- Clean Neighbourhoods and Environment Act (Northern Ireland) 2011
- Consumer Protection Act 1987
- Control of Greyhounds etc. Act (Northern Ireland) 1950
- Criminal Justice and Police Act 2001
- Dangerous Dogs Compensation and Exemption Schemes Order (Northern Ireland) 1991
- Dangerous Dogs (Northern Ireland) Order 1991
- Dangerous Substances and Explosive Atmospheres Regulations (Northern Ireland) 2003
- The Dog Control Orders (Prescribed Offences and Penalties) Regulations (NI) 2012
- The Dogs (Northern Ireland) Order 1983
- Dogs (Amendment) Act (Northern Ireland) 2001
- Dogs (Amendment) Act (Northern Ireland) 2011
- The Environment (Northern Ireland) Order 2002
- European Communities Act 1972
- Explosives Act (Northern Ireland) 1970
- Food Act 1984
- Food and Environment Protection Act 1985
- The Food (Northern Ireland) Order 1989
- The Food Safety (Northern Ireland) Order 1991
- The General Product Safety Regulations 2005
- Hairdressers Act (Northern Ireland) 1939
- Health and Personal Social Services (Northern Ireland) Order 1978
- Health and Safety at Work (Northern Ireland) Order 1978
- High Hedges Act (Northern Ireland) 2011
- Housing (Amendment) Act (Northern Ireland) 2011
- The Housing (Northern Ireland) Order 2003
- The Housing (Northern Ireland) Order 1992
- Housing (Northern Ireland) Order 1981
- Houses in Multiple Occupation Act (Northern Ireland) 2016

- The Licensing (Northern Ireland) Order 1996
- The Litter (Northern Ireland) Order 1994 – Excluding Article 10
- Local Government Act (Northern Ireland) 1972
- The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 - excluding provisions relating to the issue of all sex establishment licences and those entertainments licences where adverse representations have been made.
- The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992
- The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1995 – excluding provisions relating to street names.
- The Local Government (Northern Ireland) Order 2005
- Noise Act 1996 (as amended)
- Petroleum (Consolidation) Acts (Northern Ireland) 1929
- Petroleum (Transfer of Licences) Acts (Northern Ireland) 1937
- The Petroleum (Consolidation) Act (Amendment of Licensing Provisions) Regulations (Northern Ireland) 2012
- Poisons (Northern Ireland) Order 1976
- Pollution Control and Local Government (Northern Ireland) Order 1978
- The Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013
- The Private Tenancies (Northern Ireland) Order 2006
- Public Health Acts 1878 to 1971
- Public Health and Local Government (Miscellaneous Provisions) Act (Northern Ireland) 1949
- Rats and Mice Destruction Act 1919
- The Registration of Clubs (Northern Ireland) Order 1996
- Rent (Northern Ireland) Order 1978
- The Road Traffic Regulation (Northern Ireland) Order 1997
- Roads (Miscellaneous Provisions) Act (Northern Ireland) 2010
- The Consumer Rights act 2015
- The Safety of Sports Grounds (Northern Ireland) Order 2006
- The Shops (Sunday Trading) (Northern Ireland) Order 1997
- The Smoking (Northern Ireland) Order 2006
- Street Trading (Regulation) Act (Northern Ireland) 1929 (repealed in part)
- Street Trading Act (Northern Ireland) 2001
- The Energy Performance of Buildings (Certificates and Inspections) Regulations (Northern Ireland) 2008
- The Health (2009 Act) Commencement No.1 Order (Northern Ireland) 2012
- The Planning (Northern Ireland) Order 1991
- The Roads (Northern Ireland) Order 1993
- The Road Traffic Regulation (Northern Ireland) Order 1997
- Sunbeds Act (Northern Ireland) 2011

- Tobacco Advertising and Promotion Act 2002
- Tobacco Retailers Act (Northern Ireland) 2014
- Town Improvement Clauses Act 1847
- The Traffic Management (Northern Ireland) Order 2005
- Volatile Organic Compounds in Paints, Varnishes and Vehicle Refinishing Products 2012
- The Waste and Contaminated Land (Northern Ireland) Order 1997
- Welfare of Animals Act (Northern Ireland) 2011
- Welfare Services Act (Northern Ireland) 1971
- The Health Protection (Coronavirus, Restrictions) (No2) Regulations (Northern Ireland) 2020.

Economic Development and Regeneration

- The Local Government Order 2002 (8.2 1a) - Promote Economic Development within the Borough.
- Local Government Act (Northern Ireland) 2014 – Part 10 Community Planning.
- Local Government Act (Northern Ireland) 2014 – Part 11 General Powers of Competence.
- Local Government Act (Northern Ireland) 2014 – Part 12 General Duty to Improve.
- Northern Area Plan (NAP), adopted by the former Department of the Environment (DOE) on 22nd September 2015.
- Disposal of Surplus Public Sector Property in NI (D1).
- Disposal of Surplus Public Sector Property in Northern Ireland October 2018.
- Local Enterprise Partnerships (LEPs) and Enterprise Zones.
- Guidance Business Improvement Districts Published 8 November 2014.
- Town Improvement Clauses Act (1847).

Sport and Wellbeing

- Health and Safety at Work (Northern Ireland) Order 1978.
- Recreation and Youth Service (Northern Ireland) Order 1986 - Provide, maintain and manage facilities for recreational, social, physical and cultural activities.
- Local Government Act (Northern Ireland) 2014 – Part 10 Community Planning.
- Local Government Act (Northern Ireland) 2014 – Part 11 General Powers of Competence.
- Local Government Act (Northern Ireland) 2014 – Part 12 General Duty to Improve.
- Rural Needs Act (Northern Ireland) 2016.
- Safety of Sports Grounds (Northern Ireland) Order 2006.
- J. Safeguarding Board Act (Northern Ireland) 2011.
- Autism Act (Northern-Ireland) 2011.
- Children's Services Co-operation Act 2015

Tourism and Recreation

- Health and Safety at Work (Northern Ireland) Order 1978.
- Local Government Act (Northern Ireland) 2014 – Part 10 Community Planning.
- Local Government Act (Northern Ireland) 2014 – Part 11 General Powers of Competence.
- Local Government Act (Northern Ireland) 2014 – Part 12 General Duty to Improve.
- Caravans Act (NI) 2011 – Management and Operation of Council’s Holiday Parks.
- Tourism (Northern Ireland) Order 1992 – Promotion and Development of Tourism within the Borough.
- The Recreation and Youth Service (Northern Ireland) Order 1986 - Provision by district councils of facilities for recreational, social, physical and cultural activities.
- Access to the Countryside (NI) Order 1983 – Protection of Public Rights of Way
- Nature Conservation and Amenity Lands (Northern Ireland) Order 1985 – Provision and protection of Nature Reserves.
- Wildlife and Natural Environment Act (Northern Ireland) 2011 (WANE) – Conservation of Biodiversity.
- The Conservation (Natural Habitats, etc.) (Amendment) Regulations (Northern Ireland) 2007.

Community and Culture

- Health and Safety at Work (Northern Ireland) Order 1978.
- Local Government Act (Northern Ireland) 2014 – Part 10 Community Planning.
- Local Government Act (Northern Ireland) 2014 – Part 11 General Powers of Competence.
- Local Government Act (Northern Ireland) 2014 – Part 12 General Duty to Improve.
- Recreation and Youth Service (Northern Ireland) Order 1986 - Provide, maintain and manage facilities for recreational, social, physical and cultural activities.
- Museums and Galleries (Northern Ireland) Order 1998 - Provide and maintain museums and galleries.
- Justice Act (Northern Ireland) 2011 sections 20-34 and schedules 1 and 2 – Establish and operate a PCSP within the Borough.
- NI Executive Office’s Strategy for Good Relations, ‘Together Building a United Community’ - Deliver a Good Relations Programme within the Borough.
- Section 75 (2) of the Northern Ireland Act 1998 – (Good Relations)
- Urban Regeneration and Community Development Policy Framework 2013 - Develop and deliver a Community Support Plan.
- Local Government Act NI 1972 – sections 106,107, 108 – Contributions to voluntary bodies.

Appendix Three

Attendees at Training on Legal Principles and Record Keeping

ATTENDEE LIST FOR PRESENTATION BY GORDON ANTHONY BL

7 OCTOBER 2022 and 17 NOVEMBER 2022

	Name	Directorate	Job title/role
1		Chief Executive's Office	Chief Executive
2		Corporate Services	Deputy Chief Executive/Director of Corporate Services
3		Leisure & Development	Director of Leisure & Development
4		Environmental Services	Director of Environmental Services
5		Corporate Services	Head of Operational Development and Human Resources
6		Environmental Services	Head of Estates
7		Environmental Services	Head of Health & Built Environment
8		Environmental Services	Head of Capital Works, Energy & Infrastructure
9		Leisure & Development	Head of Community & Culture
10		Leisure & Development	Head of Sport & Wellbeing
11		Leisure & Development	Head of Tourism & Recreation
12		Leisure & Development	Head of Prosperity & Place
13		Performance	Head of Performance
14		Corporate Services	Head of Policy & Community Planning
15		Planning	Head of Planning
16		Reports to Chief Executive	Chief Finance Officer
17		Corporate Services	Democratic Services & Central Services Manager
18		Corporate Services	Audit, Risk & Governance Officer
19		Leisure and Development	Funding Unit Manager

Appendix IV

Slides Prepared for Training on Legal Principles and Record Keeping

Provided by attachment

Local authority decision-making: A guide to public law principle

Gordon Anthony

1

Purpose of this presentation

To provide an overview of the public law principles that bind local authorities.

To focus in particular on the relevance of record retention and legal challenges.

2

Structure

Will address four main issues:

1. "Good administration" and the relationship between "values" and "principles"
2. The legislative framework.
3. Key public law principles and how they apply to local authorities.
4. Pre-action protocol and record keeping: *Re CAJ* [2015] NIQB .

3

What is "good administration"?

1. Can be defined, in the negative, with reference to "maladministration" (Ombudsman, etc). See, in this context, the "Crossman catalogue" – arbitrariness; bias; delay; inattention; incompetence; ineptitude; neglect; perversity; turpitude, etc. But note that "maladministration" is not necessarily the same thing as "illegality".
2. Good administration itself? See, by analogy, Article 41 of the Charter of Fundamental Rights of the European Union:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions."

4

Some values

- Take your pick, but these include:
1. Participation.
 2. Openness.
 3. Transparency.
 4. Accountability.
 5. Efficiency? Value for money? Etc...

5

Values vs. principles?

Distinction is not entirely straightforward but, in general, litigation focuses on principles (below), which can either overlap with, or give legal form to, values. This is notably true of the principle of procedural fairness.

6

The legal framework

Difference between "hard law" and "soft law".

Hard law measures include:

1. The 1972 and 2014 Local Government Acts. (And see also legislation in relation to, eg, finance.)
2. Human Rights Act 1998.
3. Freedom of Information Act 2000 and Environmental Information Regulations 2004.
4. Planning (NI) Act 2011 (where there can be a cross-over with "retained" EU law under the European Union (Withdrawal) Act 2018).

7

Human Rights Act 1998

Four points to note:

1. By section 6, public authorities have a duty always to act in a manner that is consistent with the Convention rights.
2. The Convention rights include the Article 8 right to private and family life, home and correspondence; the Article 6 right to a fair hearing; and the Article 1 Protocol 1 right to peaceful enjoyment of property.
3. Key principles can include "proportionality" and the "duty to give reasons".
4. Local authorities need not reason internally with reference to rights, but this can have implications for how closely the courts might look at a decision: see *Begum* [2007] 1 AC 100.

8

The legal framework

Soft law (query: "hard law") measures include, most obviously, the Code of Conduct for Local Government Employees. This is built upon the Nolan principles of:

1. Selflessness.
2. Integrity.
3. Objectivity.
4. Accountability.
5. Openness.
6. Honesty.
7. Leadership.

9

The main public law principles

1. These typically come to life through the judicial review procedure.
2. What is judicial review? - The area of law that is concerned with "public law" issues and **not private disputes** involving no element of public law" (*Re Wylie's Application* [2005] NI 359).
3. "Review, not appeal". Difference between "procedure" and "substance": "Legality, not merits".
4. Why is good record keeping important? Let us see.....

10

The main grounds for (principles of) judicial review

- There are six main grounds (which can overlap):
1. Illegality.
 2. Procedural unfairness.
 3. Unreasonableness.
 4. Proportionality.
 5. Equality.
 6. Legitimate expectation.

11

The main public law principles

1. Good record keeping is key to being able to meet any of the grounds for challenge - a local authority will have to be able to provide an affidavit that exhibits a detailed response to the grounds for challenge.
2. A strong record of decision-making can be relevant to the question of whether a decision is reasonable/proportionate: see *Begum* [2007] 1 AC 100.
3. Documents/records are also central to the ground of procedural fairness, where that is the basis for a challenge.

12

What is "fairness", and where do its requirements come from?

1. It is a context sensitive standard

13

"[The] so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends upon the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates." (*Lloyd v McMahon* [1987] 1 AC 625, 702, Lord Bridge)

14

What is "fairness", and where do its requirements come from?

1. It is a context sensitive standard.
2. "Fairness" and "natural justice".
3. "Rights", "interests", and "legitimate expectations".
4. Fairness "before", "during", and "after" the decision-making process.
5. Importance of "transparency", "participation", and "accountability".

15

Where does it come from? Statute law

1. Legislation that grants a decision-making power will often impose procedural requirements.
2. A requirement “before” the decision-making process may entail notification that a decision is to be taken.
3. A requirement “during” the decision-making process might require a hearing or consultation.
4. A requirement “after” may be that reasons be given for a decision.
5. Planning as an example?

16

Statute law and fairness – some key requirements

- Consultation – this goes very much to ideas of participation.
- It should be “adequate” (context ...).
- Whether it is adequate depends upon 4 factors: (1) whether the consultation occurred at a time when proposals were still at a formative stage; (2) whether the consultee was given adequate information on which to respond; (3) whether the consultee was given adequate time in which to respond; and (4) whether the decision-maker considered conscientiously the response to consultation.
- See *R (Mosley) v London Borough of Haringey* [2014] UKSC 56, [2014] WLR 3947.

17

Statute law and fairness – some key requirements

- Reasons – these go very much to the idea of transparency.
- Reasons build public confidence by concentrating the mind of the decision-maker, demonstrating to the recipient that this has been so; showing that the issues have been conscientiously addressed; and/or alerting the recipient to a justiciable flaw in the process.
- But do they make the decision-making process unduly difficult, e.g., by requiring the appearance of unanimity?
- And compare the common law approach, below?
- For the leading statement about rights, both under statute law and common law see *Dover De v Kent* [2017] UKSC 79, [2018] 1 WLR 108. Reasons must be “adequate and intelligible”.

18

Fairness: common law rules

There are two:

- The right to a hearing; and
- The rule against bias

19

The right to a hearing

This has five main sub-elements, which correspond with the "before", "during", and "after" stages of decision-making:

1. Notification
2. Nature of the hearing
3. Representation
4. Reasons
5. Appeals and re-hearings

20

The rule against bias

There are two types:

1. Actual bias
2. Apparent bias

21

Article 6 ECHR

1. Statute law and common law also co-exist with Article 6 ECHR.
2. So far as is relevant, this provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
3. It does not refer to "civil" liberties but rather to interests that are essentially economic. Civil rights thus include real property; contracts; social security payments; and (most) employment disputes.
4. However, Article 6 does not cover the employment rights of, e.g., police officers; does not apply to immigration and asylum disputes; and does not cover disputes about access to social housing (*Tomlinson* [2010] 2 All ER 175).

22

Pre-action protocol – how Applicants can access documents

Pre-Action Protocol in NI has been in place for 18 years, more or less, and is now contained in Practice Direction 03/2018.

1. **Must** be observed.
2. Underlying idea is?
3. Time-limits?
4. Role of (potential) respondents?
5. Importance of letters.
6. Requests for information? (And note cross-over with requests under the Freedom of Information Act 2000 and EIR 2004.)

23

A case study

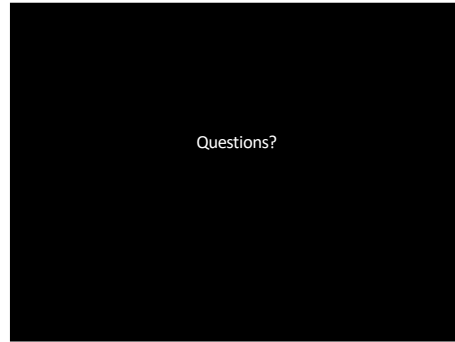
Re CAJ's Application [2015] NIQB 59

Section 28E of the Northern Ireland Act 1998 – anti-poverty strategy based upon "objective need"

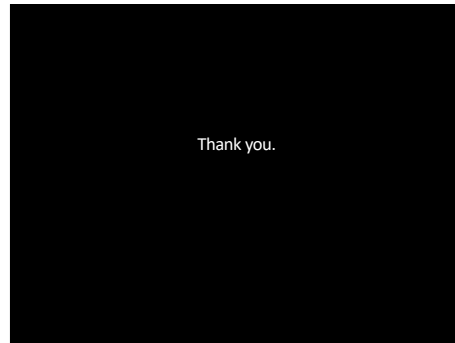
Letters were sent both under the PAP procedure and the Freedom of Information Act 2000. Inconsistent replies were received.

Footnote: section 28E is cross-referred to in section 66 of the Local Government Act (Northern Ireland) 2014

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25



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