Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 30 June 2010

Public Authority: Northern Ireland Water
Address: Westland House
Old Westland Road
Belfast
BT14 6TE

Summary

On 23 October 2007 the complainant made a request for information relating to a contract between Northern Ireland Water and Dalriada Water Ltd concerning the upgrade of existing water treatment facilities in Northern Ireland. Northern Ireland Water initially refused the request before providing a redacted version of the contract to the complainant. The complainant disputed the application of exemptions to the withheld information and the handling of his request. Following the Commissioner's intervention, Northern Ireland Water accepted the Commissioner's view that the information was environmental but maintained the view that the information originally withheld under the Act was also exempt under the EIR, relying on the exceptions at regulations 12(5)(a), 12(5)(e) and 13.

The Commissioner's decision is that Northern Ireland Water correctly withheld a small portion of the withheld information from the complainant but the remainder is not exempt and should be disclosed. The Commissioner also found a number of procedural breaches in relation to the handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in

accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

2. The Environmental Information Regulations (the EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the Commissioner). In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR.

Background

3. Northern Ireland Water (NI Water) is a Government owned company (GoCo) which is a statutory trading body owned by central government but operating under company legislation, with substantial independence from government. As a GoCo, NI Water falls under section 6 of the Act and is therefore a public authority under regulation 2(2)(b) of the EIR.

4. The Water Treatment Project (Project Alpha) is one of the largest Public Private Partnerships (PPP) in the UK and concerns the negotiated terms of a 25 year construction and operation agreement between NI Water and Dalriada Water Limited. The contract is in relation to the design, construction and upgrade of existing water treatment facilities in Northern Ireland and represents approximately 50% of Northern Ireland's water production.

The Request

5. On 23 October 2007 the complainant made the following request to NI Water:

> "*I would like to make a request for information under the Freedom of Information Act. I would like to request the Contract with Dalriada Wastewater which had been procured through the OJEU/OJEC Notice on 21 May 2004 and was agreed for a 25 year term on 30 May 2006. I believe the planned date of operation is 13 September 2008. The Contract was named project Alpha and was*

for the design, construction (or upgrade), operation, maintenance of existing works and associated infrastructure for the provision of water.

We realise that small sections, such as pricing methodology, of the contract will be commercially sensitive, but once these sections are removed, we look forward to receiving the rest of the contract".

6. On 16 November 2007 NI Water advised the complainant that it was "currently considering a number of complex issues relating to the application of the public interest to the exemptions available". NI Water indicated that it would require 15 working days to provide a substantive response to the request.

7. On 5 December 2007 NI Water advised the complainant of its decision to refuse his request. NI Water explained that it considered the information contained within the contract to be exempt under section 36(2)(c) (prejudice to the effective conduct of public affairs), section 43 (prejudice to commercial interests), section 38 (health and safety) and section 40 (personal data). In relation to the qualified exemptions (those at sections 36(2)(c), 43 and 38) NI Water was of the view that the public interest in withholding the information was greater than the public interest in disclosing the information.

8. On 17 December 2008 the complainant wrote to NI Water to request that it carry out an internal review of its decision to refuse to provide the requested information. The complainant explained that he had no issue with NI Water's decision to withhold certain information in relation to section 38 (Health and safety) and section 40 (Personal information) and also accepted that parts of the contract would be exempt under section 43 (Commercial interests) for example, pricing methodology (but not the final price) and caps on liability. However the complainant remained of the view that the remainder of the information should not be exempt.

9. NI Water acknowledged the request for an internal review on 28 January 2008 and on 28 February 2008 NI Water advised the complainant that the review was taking longer than anticipated owing to the nature of the requested information.

10. On 9 April 2008 NI Water advised the complainant that it had completed its internal review. NI Water noted that the complainant had accepted certain parts of the contract would be exempt from disclosure and also referred the complainant to section 12 of the Act which provides that a public authority is not obliged to comply with a request if to do so would exceed the "cost limit" (£450 for NI Water). The review panel had concluded that the process of reviewing the requested information to decide which information was exempt and which could be disclosed would exceed the cost limit. NI Water advised that it was content to provide the complainant with a redacted version of the requested information, if this could be done within the cost limit.

11. On 17 April 2008 NI Water provided the complainant with a redacted version of the requested information.

The Investigation

Scope of the case

12. On 13 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- the complainant was of the view that NI Water had taken too long to deal with the request;
- the internal review did not consider whether the requested information was exempt, it merely determined how much it would cost to review the information;
- the complainant was unable to print the electronic document provided by NI Water, and it took a further two weeks for NI Water to provide a printable version of the information. This meant the complainant was delayed in establishing what information remained withheld;
- the complainant did not accept that the remaining withheld information was in fact exempt.

13. The complainant advised he had no issue with NIW's decision to withhold information under sections 38 and 40(2) of the Act, as well as certain financial information under section 43

of the Act. Therefore the Commissioner has not considered this information as part of his decision in this case.

Chronology

14. On reviewing the case file it appeared to the Commissioner that the complainant had requested environmental information, and that NI Water ought to have considered the request under the EIR rather than the Act.

15. On 20 March 2009 the Commissioner advised NI Water of his view in relation to the correct access regime. The Commissioner invited NI Water to reconsider the request under the provisions of the EIR.

16. NI Water responded to the Commissioner on 1 May 2009, accepting the Commissioner's view that the information was environmental, and therefore was no longer seeking to rely on exemptions under the Act.

17. NI Water advised the Commissioner that it had reconsidered the request and had reached the view that the information withheld under the Act was also exempt under the EIR. NI Water therefore sought to rely on the exceptions at regulations 12(5)(a), 12(5)(e) and 13 of the EIR. NI Water provided the Commissioner with its arguments and reasoning behind applying these exceptions to the withheld information.

18. NI Water provided the Commissioner with a copy of the contract clauses and schedules (without redactions) and a copy of the redacted information as provided to the complainant. The Commissioner also requested copies of the information previously withheld on the basis of section 38 and 40(2) of the Act.

Findings of fact

19. The requested information comprises the following:

    i. Contract between the Department for Regional Development Northern Ireland and Dalriada Water Limited relating to Project Alpha, dated 30 May 2006. The contract is for the design, upgrading, construction, financing, operation and maintenance of water treatment works and link mains and the provision of

water related services and sludge treatment services in Northern Ireland.
ii. Contract terms.
iii. Contractor's proposals.
iv. Construction programme.
v. Service delivery plans.
vi. Works delivery plans.

20. As explained above, the complainant did not challenge NI Water's reliance on the exemptions at sections 38 and 40(2) and in fact stressed this point in his correspondence with the Commissioner. Therefore the Commissioner has not investigated NI Water's application of the corresponding exceptions under the EIR (regulation 12(5)(a) and regulation 13 respectively).

21. The Commissioner has also scoped out information relating to pricing methodologies and caps of liability as the complainant had advised NI Water that he had no issue with NI Water's decision to withhold this type of information.

22. Therefore the Commissioner's decision relates only to the remaining information originally withheld under section 43 of the Act, and then under regulation 12(5)(e) of the EIR.

Analysis

Exceptions

23. Under the EIR a public authority may refuse to disclose information if one or more exceptions apply and if, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in disclosing the information. Regulation 12(2) of the EIR states that public authorities should apply a presumption in favour of disclosure.

Regulation 12(5)(e)

24. Regulation 12 of the EIR states:

> (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'.

25. The Commissioner considers that this exception can be broken down into four elements, all of which are required in order for the exception to be engaged:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

26. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

27. NI Water advised the Commissioner that the contract relates to the production of drinking water, which is an industrial process undertaken for commercial gain by the contracted supplier. NI Water advised that the non-commercial/non-industrial aspects of the contract have already been disclosed to the complainant in the redacted version of the contract. NI Water considers the remainder of the contract is a commercial agreement for a holistic industrial service and that each and every redacted term has a commercial implication and value in respect of placing and managing commercial risk over and above the redacted standard form agreement. NI Water argues that the contract must be considered holistically as a commercial/industrial agreement in its entirety and that it is impossible to assess redaction on a line by line basis. NI Water considers the redacted contract as commercial/industrial information and not generic in nature.

28. In view of the above, the Commissioner is satisfied that the information is commercial in nature in that the contract

relates to the production of drinking water for commercial gain.

Is the information subject to confidentiality provided by law?

29. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, contractual obligation or statute. There is no need under regulation 12(5)(e) for the information to have been obtained from another. The exception can therefore also cover information created by the public authority and provided to another, or to information jointly created or agreed between the public authority and a third party.

30. NI Water presented an argument that the information was covered by contractual obligation. Clause 57 of the contract relates to information, confidentiality and freedom of information and imposes a legal duty on both parties to keep the relevant information confidential.

31. As the information was subject to a contractual obligation (the confidentiality clause) the Commissioner is minded to accept that the information is subject to confidentiality provided by law and as such there is no need to consider the common law test of confidence.

32. Having established that the requested information is subject to confidentiality provided by law, the Commissioner considered whether that confidence was necessary to protect a legitimate economic interest.

Is confidentiality provided to protect a legitimate economic interest?

33. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect – in this case NI Water and Dalriada Water Ltd.

34. In the Commissioner's view, it is not enough that some harm ***might*** be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm ***would*** be caused by the disclosure.

35. In accordance with various decisions heard before the First-tier Tribunal (Information Rights), the Commissioner interprets "would" to mean "more probable than not".

NI Water

36. In its submissions to the Commissioner, NI Water advised that the information covered by the exception under regulation 12(5)(e) includes a range of commercially sensitive information including information supplied as part of a procurement process. NI Water explained that it is currently engaged with three major PPP and Private Finance Initiative (PFI) contracts, two of which have achieved service commencement and one has not. NI Water advised there are ongoing significant negotiations, disputes and changes being made at present to each of these contracts and argue that any disclosure could adversely affect these activities.

37. NI Water advised the Commissioner that the financial implications of releasing the information regarding any of the above contracts could result in losses to NI Water of more than £5 million - due to potential challenges to contracts particularly in regard to service performance deductions which are very different across each of the three contracts.

38. NI Water considers that all the information listed in schedule 26 of the contract is exempt from disclosure. It has advised the Commissioner that it is this schedule that contains the key information which is considered by NIW to be of significant commercial value and which would give a competitive advantage to any party negotiating commercial transactions with NI Water or Dalriada Water Ltd.

39. NI Water argue that disclosure of the information listed in schedule 26 would provide other contractors in dispute with NI Water with the ability to establish a link between the scale of performance deductions in each contract - which would prejudice NI Water's position in respect of its ability to defend other contractual disputes, which would prejudice NI Water's economic interests.

40. NI Water further advised it is presently engaging in a significant number of additional contract negotiations and argued that disclosure could seriously undermine its ability to treat all contractors equally, as the disclosed information could greatly assist potential bidders.

41. NI Water previously indicated to the Commissioner that its original determination to withhold certain information could be reconsidered after June 2010. This was based on a presumption that the majority of contract negotiations between NI Water and other contractors would have been settled. NI Water has since revised this stance and advised the Commissioner that this assumption was incorrect and that negotiations and other considerations with other contractors remain ongoing.

42. NI Water also highlighted that the redacted information contains information provided and or negotiated by the contractor as to how and when it is obliged or intends to provide the services. NI Water considers this information is proprietary, technical and financial in nature that has been collated over a lengthy period by a consortium of water utility contractors. NI Water advised the Commissioner that it believed disclosure could provide potential competitors with information on business methods and practices, thus negating the contractor's ability to develop commercial advantage and to protect the contractor's legitimate economic interest.

43. The Commissioner asked NI Water if it had consulted with the third parties in this matter concerning possible disclosure and was provided with correspondence in the form of emails between NIW and Dalriada Water Ltd. The content of the emails related more to what should or should not be disclosed to the complainant and did not contain arguments that explained the adverse effect that disclosure would have upon its legitimate economic interests. The Commissioner did not consider that NI Water had provided any substantive evidence to support why disclosure would harm the economic interests of Dalriada Water Ltd.

44. The Commissioner again asked NI Water to provide clear evidence that genuinely reflected Dalriada's concerns regarding the adverse effect that disclosure of Alpha contract would have on Dalriada's economic interests.

Dalriada Water Ltd

45. NI Water subsequently provided the Commissioner with a formal response from Dalriada Water Ltd that reflected their concerns in the event that certain information regarding Project Alpha was disclosed.

46. Dalriada Water Ltd focused its arguments on the items listed under schedule 26 of the contract. Dalriada Water Ltd considered that the information covered by schedule 26 was predominantly of a commercial and financial nature and believes it did not satisfy the definition of environmental information. However, the Commissioner does not accept this argument as the information referred to in Schedule 26 clearly contains information that falls within the definition of environmental information at regulation 2(1)(c) of the EIR.

47. In its submission to the Commissioner, Dalriada Water Ltd advised that it and its parent company KWS operated in a competitive commercial environment in which they participated in tender processes to bid, win and operate long term projects such as Project Alpha. The information covered by Schedule 26 includes unique and bespoke designs and intellectual property that enabled it to win the Project Alpha bid.

48. Dalriada Water Ltd advised it had invested several million pounds in bid, design and development costs to generate these designs and intellectual property and had capitalised these costs in the Financial Model in Schedule 26 as they are deemed to have a long term value of the lifetime of Project Alpha. Dalriada Water Ltd also argued that KWS gained a further return on this investment by utilising Project Alpha material on other bid submissions for other similar projects across the UK.

49. Dalriada Water Ltd advised that uncontrolled access to the commercially sensitive information listed in Schedule 26 would lead to a failure on the part of Dalriada to assure the relevant statutory authorities that it could comply with its contractual obligations in relation to the protection and security of the sites and would make Dalriada Water Ltd liable to compensate NI Water for any loss caused by a breach of its obligations.

50. In conclusion Dalriada Water Ltd believed that should the information listed in Schedule 26 be disclosed it would have the following adverse affects:

- Significant loss of commercial advantage in the current marketplace as the designs associated with Project Alpha would be available to multiple parties, enabling

them to replicate these designs without incurring the same level of investment as Dalriada, placing it at a commercial disadvantage to its rivals.

- Disclosure of designs of the works would compromise Dalriada's ability to comply with its contractual obligations in relation to security, exposing Dalriada to the real risk of increased insurance premiums and the need to compensate NI water for any loss caused by a breach of the required necessary standards of vigilance and precautions.
- A need to prematurely write off the bid and development costs asset on the balance sheet, representing a seven figure loss to Dalriada Water Ltd and would threaten the viability of Project Alpha as it would represent an unplanned significant change to the Financial Model which was the basis upon which funding for the project was first secured.
- Significant loss of commercial advantage in the form of other parties being able to seek equivalent terms from lending organisations - without firstly having to undertake the commercial negotiations and competitions that KWS experienced.
- Disclosure of current and future financial projections for Dalriada Water Ltd would – if made available to competitors or suppliers, adversely impact on Dalriada's commercial integrity and negotiation position both currently and in the future.

51. As has already been stated above, the Commissioner considers it is not enough that some harm ***could, or might*** be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm ***would*** be caused by the disclosure. In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

> *"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

52. The Commissioner has considered the arguments as put forward by both NI Water and Dalriada Water Ltd and accepts

that the information listed in Schedule 26 contains financial information which, as at the date of the request, was of significant commercial value and which would give a competitive advantage to any party competing against or negotiating commercial transactions with Dalriada Water Ltd. He also accepts that the information listed in Schedule 26 contains information on designs of the works and that disclosure of this type of information would compromise Dalriada's ability to comply with its contractual obligations in relation to security and would lead to a loss in commercial advantage in the marketplace, both of which would adversely affect Dalriada's economic interests.

53. As previously indicated, the complainant in this case had already agreed with NI Water that certain information, for example pricing methodology, caps on liability and the like, might be considered commercially sensitive and need not be disclosed, likewise information concerning security such as site plans etc and personal information. The Commissioner has therefore scoped such financial information (including financial modelling), security information and personal information from the scope of this investigation.

54. However, NI Water has failed to provide the Commissioner with sufficient evidence that, on the balance of probabilities, disclosure of the remainder of the contract (the information not listed in schedule 26 and not already scoped out of this investigation) would adversely affect a legitimate economic interest of NI Water or Dalriada Water Ltd.

Would confidentiality be adversely affected by disclosure?

55. In relation to the majority of the information contained within the contract, NI Water failed to demonstrate that there are legitimate economic interests relating to Dalriada Water Ltd or its own interests which require the protection of confidentiality. In the absence of any evidence on this point the Commissioner is unable to conclude that the exception at regulation 12(5)(e) is engaged. Because the exception is not engaged in respect of this information he is not required to consider the public interest test in relation to its disclosure.

56. In relation to the information contained within Schedule 26 the Commissioner considers that as the first three elements of the test cited at paragraph 26 of this notice have been established, it follows that disclosure into the public domain

would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of both parties. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the information listed in Schedule 26.

57. As the exception is engaged in relation to the information listed in Schedule 26 the Commissioner has proceeded to consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. In doing so, the Commissioner has considered the submissions on the public interest made by both the complainant and NI Water, taking into consideration the specific content and wider context of the withheld information.

Public interest arguments in favour of disclosing the information

58. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure.

59. The complainant has suggested that the information should be disclosed as it will ensure public procurement is conducted in a fair and transparent manner and does not discriminate against bidders.

60. The complainant also referred to the Commissioner's guidance on commercial interests, in particular that disclosure would allow public scrutiny of decisions made by NI Water as well as increasing accountability and transparency in the spending of public money.

61. NI Water considered there is a public interest in the information requested being released because this promotes accountability and transparency in decisions taken by NI Water and in the spending of public money and procurement.

62. The Commissioner acknowledges that there is always a general public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and accountability in relation to the expenditure of public funds.

Public Interest Arguments in favour of maintaining the exemption

63. NI Water has informed the Commissioner that Schedule 26 lists the most sensitive information in the contract. It is currently engaged in three major contracts that are subject to ongoing and significant negotiations, disputes and changes at the present time and believes that disclosure could adversely affect these current activities. These contracts were in prospect as at the date of the request.

64. NI Water further advised that it is also engaged in a number of significant partnership arrangements and again argued that disclosure could seriously undermine the requirement of NI Water to treat all contractors equally as the release of the contract could greatly assist potential bidders to the disadvantage of Dalriada.

65. NI Water further believes that releasing this information into the public domain as at the date of the request would have prejudiced its position on tendering further contracts in the near future, in that possible participants in the bidding process could identify the position negotiated by NI Water on recent deals which would be prejudicial to NI Waters interests and would prejudice NI Water's ability to ensure best value for the public in any future water projects it procures.

66. The Commissioner also accepts that it would not be in the public interest to prejudice the ability of Dalriada to protect its economic interests by maintaining the confidentiality of its commercially sensitive information.

67. Finally the Commissioner accepts that there is some public interest in preserving the principle of confidentiality and that disclosure of this information would damage the relationship between NI Water and Dalriada.

Balance of the public interest

68. The Commissioner recognises there is a public interest in increasing accountability of public authorities in relation to the spending of public money. He also recognises the importance of ensuring public procurement processes are conducted in a fair and transparent manner and do not discriminate against bidders.

69. However, the Commissioner considers that it would not be in the public interest to disclose information which could undermine NI Water's position on tendering further contracts or in disclosing information that may have a financial impact on existing contracts and agreements. He further recognises the need to protect commercially sensitive information, particularly in relation to ongoing issues so as not to prejudice the commercial viability of contractors.

70. The Commissioner has weighed up the competing public interest arguments and has concluded that in relation to the information listed in Schedule 26, the public interest in maintaining the exception at regulation 12(5)(e) outweighs the public interest in disclosure.

Procedural Requirements

71. The full text of the regulations referred to can be found in the Legal Annex at the end of this notice.

Regulation 5(1) and regulation 5(2)

72. Regulation 5(1) provides that environmental information shall be made available upon request. Regulation 5(2) requires a public authority to provide information as soon as possible and no later than 20 working days after the date of the request.

73. As the Commissioner finds that some of the withheld information should have been disclosed to the complainant at the time of his request it follows that NI Water has breached regulation 5(1) and regulation 5(2) in failing to do so.

Regulation 11(4)

74. Regulation 11(4) provides that on receipt of representations from an applicant, a public authority should consider whether it complied with the requirements of the EIR. Such 'internal reviews' should be completed as soon as possible and no later than 40 working days after the date of representations.

75. The complainant expressed his dissatisfaction with NI Water's handling of his request and made representations to NI Water on 17 December 2007, requesting an internal review of its decision to refuse his request.

76. The Commissioner considers that NI Water breached regulation 11(4) as it took NI Water 79 working days, from the complainant's first request for a review, to complete the review process.

Regulation 14

77. Regulation 14(2) states that if a request for environmental information is refused, this refusal should be made in writing in no later than 20 working days after the date of the request.

78. In delivering the refusal of the earlier request made by the complainant NI Water advised the complainant it was relying on exemptions under the Act. NI Water later accepted that the request should have been considered under the EIR. The Commissioner considers that the refusal notice communicated to the complainant on 5 December 2007 constitutes a refusal of his request for environmental information. The Commissioner considers that the internal review does not meet the requirements of regulation 14(2) in that it was not provided to the complainant within 20 working days.

79. The Commissioner considers that NI Water breached regulation 14(2).

80. Regulation 14(3) states that the refusal shall specify the reasons not to disclose the information requested including:

> (a) any exception relied on under regulations 12(4), 12(5) or 13.

81. The Commissioner considers that NI Water breached regulation 14(3) in that internal review delivered to the complaint failed to cite any exceptions under EIR, relying instead on exemptions under the Act.

Regulation 6

82. The Commissioner notes the complaint that the original document provided wasn't printable, and that it took a further two weeks to obtain a printable version. However he has been given no evidence to suggest that the complainant had originally specified that a printable electronic version of the information should have been provided. He therefore does not find NI Water in breach of regulation 6 in this respect.

The Decision

83. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- NI Water was entitled to rely on the exception at regulation 12(5)(e) in relation to the information listed at Schedule 26 of the Project Alpha and the public interest in maintaining the exception outweighs the public interest in disclosing the information.

84. However, the Commissioner has also decided that the following elements of the request were not dealt in accordance with the EIR:

- NI Water has failed to demonstrate that the remainder of the withheld information (the information not listed at schedule 26 and not already scoped out of this investigation) is excepted by virtue of regulation 12(5)(e).
- In failing to provide the above information within twenty working days of the request, NI Water breached regulations 5(1) and (2).
- In failing to undertake an internal review within 40 working days of receipt of the request for the internal review, NI Water breached regulation 11(4).
- In failing to provide a refusal to the request within 20 working days of receipt, NI Water breached regulation 14(2).
- In failing to cite any exceptions under EIR in its refusal notice, NI Water breached regulation 14(3).

Steps Required

85. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose the withheld information in the Contract Clauses and Schedules as originally provided to the complainant in redacted form on 17 April 2008.

- This disclosure **should not** include the following:

- The information listed in schedule 26 of the contract.
- information concerning national security or public safety (the information withheld under regulation 12(5)(a) and:
- personal data (the information withheld under regulation 13, including Schedule 32 – Agreement for Easements)

86. The public authority must take the steps required by this Notice within 35 calendar days of the date of this notice.

Failure to comply

87. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

88. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

89. The Commissioner notes the complaint that the internal review did not consider the whether the information was exempt, rather it determined how much it would cost to review the information. In this particular case the FOI section 12 exemption that NI Water chose to rely upon could not apply under the EIR. However, regardless of this, the Commissioner's view is that it is permissible at internal review for a public authority to claim a different exemption then advised in its original refusal.

Right of Appeal

90. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 30th day of June 2010

Signed ……

Lisa Adshead
Group Manager

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

The Environmental Information Regulations 2004

Regulation 2(1) - In these Regulations:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -

> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) reports on the implementation of environmental legislation;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

> e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.