

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 June 2011

Public Authority: Northern Ireland Water
Address: 34 College Street
Belfast
BT1 6DR

Summary

The complainant has made a series of information requests to NI Water. The three requests relevant to this complaint relate to correspondence between NI Water staff and third parties about various matters. NI Water disclosed a significant amount of information to the complainant. A small section of information relating to the second request was withheld under section 40(2) of the Act. NI Water advised that it did not hold any further information relevant to the request.

The Commissioner has carefully considered NI Water's handling of the requests, and whilst he has found that the disputed information did fall within the scope of the complainant's third request, he has not found any evidence to suggest NI Water deliberately withheld the information knowing the complainant was entitled to receive it. The Commissioner finds that some of the information in the second request that had been withheld under section 40(2) should be disclosed and has recorded a number of procedural breaches in relation to the handling of requests two and three.

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.

Background

2. Northern Ireland Water (NI Water) was established under the Water and Sewerage Services (Northern Ireland) Order 2006 as a government-owned company. NI Water is therefore a public authority by virtue of section 6(1) of the Act.
3. In August 2009, the newly appointed Chief Executive Officer of NI Water, Mr Laurence MacKenzie, identified procurement and governance issues within NI Water. An Independent Review Team (IRT) was established to conduct an investigation, which led to the dismissal of NI Water's chairman and three non-executive directors.
4. On 1 July 2010, NI Water and its sole shareholder, the Department for Regional Development (DRD), were called to give evidence before the Public Accounts Committee of the Northern Ireland Assembly (the PAC). During the hearing, certain information obtained from NI Water was disclosed by a committee member. The PAC hearing subsequently led to the suspension of the DRD Permanent Secretary pending an investigation into his handling of the removal of the non-executive directors from NI Water.
5. Following a period of severe disruption to the water supply in Northern Ireland, on 5 January 2011 NI Water announced that Mr MacKenzie had tendered his resignation.

The requests

6. Full details of the three requests relevant to this complaint are set out at Annex A at the end of this Notice.

The request of 1 April (the first request)

7. On 1 April 2010, the complainant made a request to NI Water for information broadly relating to correspondence between NI Water and third parties about corporate governance issues and the establishment of the IRT.
8. On 4 May 2010, NI Water responded to the complainant advising it did not hold some of the requested information. NI Water advised that it was disclosing all the information it did hold that fell within the scope of the request. This included some information which was personal data relating to the complainant.

9. On 6 May 2010, the complainant asked NI Water to confirm that it had provided him with all the relevant information it held, as he did not believe that this had been the case.
10. On 13 May 2010, NI Water advised the complainant that it had indeed provided him with all the relevant information it held. NI Water confirmed that it had not sought to withhold any information from the complainant.

The request of 30 April 2010 (the second request)

11. On 30 April 2010, the complainant submitted a second request to NI Water. This request was for correspondence relating to Mr Don Price, one of the non-executive directors of NI Water, and for further information relating to the operation of the IRT.
12. On 2 June 2010, NI Water responded to the complainant. NI Water considered the second request to be very similar to the first request, and advised the complainant that any relevant information had already been provided in response to that request. NI Water also advised that some of the requested information was considered to be personal information and therefore exempt under section 40(2) of the Act.
13. On 5 June 2010, the complainant requested an internal review of NI Water's decision to refuse his second request. The complainant disputed NI Water's assertion that the second request repeated parts of the first request. In addition, the complainant challenged NI Water's application of the section 40(2) exemption since he was of the view that the withheld information did not relate to any individual in their personal capacity.
14. On 5 July 2010 NI Water advised the complainant it had completed the internal review of its decision in relation to the second request. The internal review upheld NI Water's application of the section 40 exemption, and its view that all relevant non-exempt information had been provided in response to the first request.

The request of 8 May 2010 (the third request)

15. On 8 May 2010, the complainant made a third request to NI Water. This request was for information relating to a number of named individuals within and external to NI Water.
16. On 8 June 2010, NI Water responded to the third request. NI Water disclosed some information and sought clarification on certain issues.

17. The complainant wrote to NI Water on 18 June 2010. The complainant provided clarification as requested by NI Water, and raised a number of issues about the information provided. On 2 July 2010, NI Water responded to the complainant.
18. On 4 July 2010, the complainant asked NI Water to confirm whether he had been provided with all the information which fell within the scope of the three requests. The complainant referred NI Water to a recent PAC meeting, at which information was disclosed which the complainant considered fell within the scope of the first request. In light of this the complainant remained of the view that NI Water had not provided him with all of the information which fell within the scope of his requests.
19. On 9 July 2010, NI Water responded to the complainant, and explained that it had considered the scope of his requests to relate to procurement issues and matters relating to the IRT. NI Water was of the view that the information disclosed at the PAC related to a submission made to the Utility Regulator, and did not fall within the scope of any of the complainant's requests.
20. There followed several exchanges of correspondence between the complainant and NI Water. NI Water maintained that it had provided the complainant with all relevant information, but the complainant did not accept this. On 16 August 2010 NI Water provided the complainant with the information disclosed at the PAC.

The Investigation

Scope of the case

21. On 7 July 2010, the complainant contacted the Commissioner to complain about the way his three requests for information had been handled.
22. The complainant advised the Commissioner that NI Water claimed to have provided him with all the information it held which was relevant to his requests (except for a small portion of information withheld under section 40(2) of the Act). However, the complainant drew the Commissioner's attention to the information disclosed at the PAC meeting on 1 July 2010 (as referred to in paragraph four). The complainant alleged that NI Water had sought to conceal this information from him until it was disclosed on 16 August 2010. The

complainant also asked the Commissioner to consider NI Water's handling of the second request, and in particular its reliance on section 40(2) of the Act to withhold certain other information.

23. The Commissioner is mindful of the fact that under section 77 of the Act, a criminal offence may be committed where a public authority deliberately alters, defaces, blocks, erases, destroys or conceals information which it knows an applicant is entitled to receive. The Commissioner therefore considered whether a criminal investigation was required in this particular case, and this is explained in more detail in 'Other Matters' at paragraph 75 below.
24. However, the Commissioner's decision under section 50 of the Act relates only to whether or not NI Water complied with Part I of the Act in responding to the complainant's requests. Therefore, in terms of the section 50 complaint, the Commissioner investigated whether NI Water had correctly identified all of the information which fell within the scope of the complainant's requests. The Commissioner also investigated whether NI Water had correctly applied the exemption at section 40(2) to the withheld information.

Chronology

25. On 5 August 2010, the Commissioner wrote to NI Water outlining the nature of the complaint and asked a number of detailed questions in relation to its handling of the information requests.
26. NI Water provided a detailed response to the Commissioner on 10 September 2010, and on 16 December 2010, the Commissioner's staff met with NI Water to discuss the complaint.
27. Following the meeting, on 21 December 2010, the Commissioner wrote to NI Water to request further details of NI Water's handling of the complainant's requests. NI Water responded to the Commissioner on 12 January 2011.

Analysis

28. The text of all the statutory provisions referred to in this section can be found in the Legal Annex at the end of this Notice.

Substantive Procedural Matters

Section 1(1) – duty to provide information in response to a request

29. Section 1 provides that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request and (b) if that is the case to have that information communicated to him.
30. In this case the complainant has alleged that the disputed information referred to at paragraph 31 below ought to have been provided to him in response to his requests. The full text of the three requests is set out at Annex A at the end of this Notice. For clarity, the Commissioner has first examined the disputed information, and has then considered whether it falls within the scope of any of the complainant's requests.

The disputed information

31. The Commissioner has had sight of the information which the complainant alleges NI Water sought to conceal from him, i.e. the information disclosed at the PAC as indicated at paragraph 4 above (the disputed information) which comprises the four email strings.
32. The first email string was dated 17 September 2009 and originated from Peter Dixon (Chairman of Phoenix Gas and member of the IRT) to Mr MacKenzie. NI Water advised the Commissioner this email was clearly a specific reference to the PC10 process and there was no mention of procurement issues. Details of the PC10 process are set out at Annex B at the end of this notice.
33. The second email was dated 15 October 2009 and referenced a dinner party hosted by the Utility Regulator which Laurence MacKenzie had attended. The email is an overview to Peter Dixon of some of the discussions he had held and was very much in the vein of the ongoing PC10 determination.
34. The third email dated 16 September 2009 was from Peter Dixon to Laurence MacKenzie and included his reply. NI Water have advised the Commissioner that the email refers to changes that Laurence MacKenzie was embarking on respect of improving efficiency and on

work he was undertaking in respect of complaints from customers. NI Water advised that Laurence MacKenzie's response referred to the need to reduce expenditure on consultancy.

35. The fourth email dated 27 November 2009 was from Laurence MacKenzie to Peter Dixon and refers to "*Lots going on*". NI Water advised the Commissioner that at this point in November 2009, it was a reference to the PC10 process – again NI Water stress this is not an email in reference to procurement issues.
36. The Commissioner, having carefully considered the four emails that comprised the disputed information, is satisfied that it does not appear to relate to issues of procurement or corporate governance, nor does it make any reference to the IRT.

The first request

37. The complainant's first request, dated 1 April 2010, comprised eight questions. The Commissioner considers that the requested information can be accurately summarised as relating to the following broad themes:
 - Issues of procurement or corporate governance within NIW which led to the IRT;
 - The establishment of the IRT and its membership;
 - The IRT's decision to exclude information provided by a named individual;
 - The decision to dismiss the non-executive directors; and
 - Correspondence between named individuals between 1 December 2009 and 20 March 2010.
38. NI Water argued before the Commissioner that it considered the first request to have a clear focus on corporate governance and the workings of the IRT. In interpreting the request NI Water advised that it focused on the wording of the request, which was taken to refer to procurement and corporate governance. NI Water understood 'procurement' to relate to "*the process/framework for procuring goods and services*" and 'corporate governance' to relate to a "*system of internal controls which ensures the business is run properly in accordance with the principles of regularity*". The Commissioner considers this to be a reasonable interpretation of the first request.
39. NI Water confirmed to the Commissioner that it had considered the disputed information, but concluded that it did not fall within NI Water's interpretation of corporate governance or procurement. Therefore NI Water did not find it necessary to consider whether this

information should be disclosed to the complainant in response to the first request.

40. The Commissioner has examined the wording of the first request and has inspected the disputed information. The Commissioner is of the view that the disputed information does not fall within the scope of the first request, as it does not appear to relate to issues of procurement or corporate governance, nor does it make any reference to the IRT.

The second request

41. The second request was for information including records, minutes of meetings, documents, memoranda, emails and handwritten correspondence on a series of seven questions regarding procurement issues within NI Water and NI Water's interaction with the IRT. This request was specific to information held by one of NI Water's non-executive directors, Mr Don Price. Mr Price considered this to be information relating to him as an individual rather than more generally to NI Water. The information was therefore considered to be exempt under section 40(2) of the Act, and this exemption is considered below.
42. NI Water was of the view that the second request was very similar to the first request and considered that any relevant information had already been provided to the complainant in its response to that request.
43. The Commissioner has considered the wording of the second request and accepts it is quite similar to the first request in that it relates to information on the IRT, corporate governance and procurement. NI Water concluded that the only outstanding information was that withheld under section 40(2). NI Water confirmed to the Commissioner that it had again considered the disputed information, but reached the conclusion that it was not relevant to the request.

The third request

44. The third information request was also similar in nature to the first request, but was slightly broader in respect of time periods and details of specific meetings. As with the first request, NI Water advised that it considered this request as relating to procurement and governance issues and the workings of the IRT.
45. NI Water referred the Commissioner to an email dated 2 June 2010 which set out how it had considered the third request should be interpreted in the context of the IRT, procurement issues within NI

Water and corporate governance. NI Water considered that to do otherwise would be unreasonable.

46. NI Water confirmed that it considered and discussed the disputed information but interpreted it as "*not fully meeting the relevant criteria*". NI Water held the view that the main thrust of the third request was similar to the first and second requests, specifically procurement, corporate governance and the IRT.
47. The Commissioner has considered the wording of the third request and accepts that whilst it is similar to the first and second requests, it has significant differences that would appear not to have been identified by NI Water. For example, question five of the third request asks for correspondence but does not specify a subject matter, nor does it mention procurement, corporate governance or the IRT. The disputed information should have been provided to the complainant at that time as it clearly falls within the scope of this request. The Commissioner has however not seen any evidence to suggest that NI Water deliberately withheld this information and notes that it was subsequently provided to the complainant on 16 August 2010.

Exemptions

Section 40(2) – personal information (the second request)

48. Section 40(2) provides an exemption for information which is the personal data of any individual other than the applicant, where disclosure would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (DPA).
49. NI Water withheld information relating to questions six and seven of the second information request comprising three documents, one of which was the data subject's notes of interview with the IRT which had been specifically excluded from the request by the complainant in part six of the request and as such, has been removed from the scope of this investigation. The Commissioner will therefore examine NI Water's application of section 40(2) to the correspondence between the data subject and the Minister on continuing his role as a non-executive director.
50. NI Water considered that this information constituted personal data relating to the individual concerned and advised the Commissioner that the data subject had already made it clear that he did not wish his personal information to be disclosed.

Is the information personal data?

51. Personal data is defined at section 1(1) of the DPA:

“personal data’ means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”

52. The Commissioner has first considered whether or not the withheld information does in fact comprise personal data relating to living individuals. The Commissioner notes that the information withheld under this exemption comprises letters to and from named individuals. The Commissioner is of the view that individuals would be identifiable from this information and therefore he is satisfied that it is the personal data of those third parties. Such information is exempt if either of the conditions set out in section 40(3) or 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles.

Would disclosure contravene any of the data protection principles?

53. NI Water argued that disclosure of the information provided in the two letters would be unfair, and would thus breach the first data protection principle which states:

“Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”

Would it be unfair to disclose the information?

54. The Commissioner’s guidance on section 40 notes that the concept of fairness is not easy to define. However the guidance suggests the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:

- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?

- Would the third party expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?
55. In considering the processing conditions in Schedule 2 to the DPA, the Commissioner has considered Schedule 2(6) of the Act. As the information does not contain sensitive personal data, the requirements in relation to Schedule 3 do not apply.

Expectation of the data subject

56. NI Water quotes the Commissioners' guidance that suggests when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. NI Water acknowledges that whilst both letters in question relate specifically to the data subject's position as a non-executive director of NI Water, it asserts the context is not just a formal affirmation of his continuance in the post. The letter from the Minister to the data subject details circumstances that are specific to him in regard to his own performance in the role and seeks a personal commitment to adhere to certain named conditions. NI Water considers that disclosure into the public domain could cause distress and affect the data subject's private life. However it has not provided any evidence of what this damage or distress might be. NI Water also considers the data subject's response to this letter to be equally personal in that it is giving a personal assurance in confirmation of points raised by the Minister.
57. NI Water advised the Commissioner that the data subject would not have expected information held about him to be disclosed, especially given the circumstances that prompted the letters. The Commissioner notes that the data subject has indicated to NI Water that he considered the letters to be "*personal rather than corporate*" - he did not expand further on why this was the case.
58. The Commissioner considers that in this case the information contained within the two letters clearly concerns the role and performance of a senior member of NI Water's executive team. A non-executive director of a public authority should expect their role would be subject to public scrutiny. The Commissioner is of the view that the withheld information in this case would assist the public in such scrutiny. Further, given the nature of the information and the fact that the substance of the withheld information has already been discussed in considerable detail at the PAC, its release into the wider public domain would not be likely to cause any unnecessary or unjustified distress or damage to the data

subject. Therefore the Commissioner does not consider that it would be unfair to any of the individuals to release the two letters.

Would it be unlawful to disclose the information?

59. The Commissioner, having decided that disclosure the two letters would not be unfair, has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful. The Commissioner has therefore gone on to consider the Schedule 2 conditions relevant for purposes for the first principle processing of any personal data.

Schedule 2 conditions

60. The sixth condition provides that processing must be:

“necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

61. It establishes a three part test which must be satisfied:

- There must be legitimate interests in disclosing the information,
- The disclosure must be necessary for a legitimate interest of the public, and
- Even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.

62. The Commissioner believes there is a legitimate interest in NI Water being as open and transparent as possible and that there is a general public interest in knowing who is making or influencing decisions impacting on the governance of NI Water. The Commissioner is of the view that disclosure of the names in question is necessary to achieve that aim.

63. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of the two letters would not cause any unwarranted interference with the rights, freedoms and legitimate interests of the data subjects. The Commissioner is satisfied that the information relates only to those individuals' professional lives and does not intrude on their private and family lives. Furthermore,

there is no evidence to suggest that disclosure would compromise their personal safety or lead to harassment.

64. The Commissioner concludes that NI Water wrongly applied the section 40(2) exemption, and ought to have disclosed this information to the complainant.

Procedural Requirements

Section 1(1)(b): duty to provide information

65. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out in paragraphs 44 to 47 in relation to request three, the Commissioner is of the view that the withheld information (the four emails) ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld, the Commissioner concludes that NI Water failed to comply with section 1(1)(b) of the Act.
66. NI Water also breached section 1(1)(b) in that it failed to communicate the information as discussed in paragraphs 48 to 64 in relation to request two.

Section 10(1): time for compliance

67. Section 10(1) of the Act states that a public authority must comply with section 1(1) promptly and in any event, not later than 20 working days after the request has been received. As the Commissioner finds that NI Water wrongly withheld requested information in relation to request two from the complainant, it follows that NI Water failed to communicate this information to the complainant within the statutory time limit and therefore failed to comply with section 10(1)(b) of the Act.
68. Furthermore, the disputed information, namely the four emails as discussed in paragraphs 44 to 47 ought to have been disclosed to the complainant at the time of his third request on 8 May 2010. The information was subsequently disclosed on 16 August 2010. NI Water failed to communicate this information to the complainant within the statutory time limit and therefore failed to comply with section 10(1)(b) of the Act.

The Decision

69. The Commissioner has not found evidence to suggest NI Water deliberately concealed any information after it had been requested with the intention of preventing its disclosure.
70. However, the Commissioner has decided that the following elements of the requests were not dealt with in accordance with the Act:

Request two

- NI Water incorrectly applied the section 40(2) exemption to the withheld information.
- Section 1(1)(b) in that NI Water failed to provide information at the time of the request.
- Section 10(1) in that NI Water failed to communicate requested information within the statutory time limit.

Request three

- Section 1(1)(b) in that NI Water failed to provide information at the time of the request.
- Section 10(1) in that NI Water failed to communicate requested information within the statutory time limit.

Steps Required

71. The Commissioner requires NI Water to take the following steps to ensure compliance with the Act:
- To disclose to the complainant, part of the information previously withheld under section 40(2) comprising of a letter from the Minister and his response, both of which are dated 3 March 2010.
72. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Other matters

Alleged section 77 offence

74. In this case, the complainant has argued to the Commissioner that NI Water concealed the disputed information from him until it was disclosed on 16 August 2010.
75. Section 77 of the Act states that a criminal offence is committed if an authority alters, defaces, blocks, erases, destroys or conceals any information with the intention of preventing the applicant from receiving any of the information he is entitled to receive. In order to secure a conviction in criminal proceedings, each element of an offence must be proven to the criminal standard, that being 'beyond reasonable doubt', as opposed to the lesser civil standard of 'balance of probabilities'. If this standard of proof is not met, the prosecution will fail.
76. The Commissioner has considered all the circumstances of this case and whilst he has found that the disputed information did fall within the scope of the complainant's third request, he has not found any evidence to suggest NI Water withheld it with the intention of preventing the complainant from receiving information he was entitled to receive. Therefore the Commissioner cannot be satisfied that NI Water did in fact block or conceal information which the complainant was entitled to receive and therefore he has not pursued a criminal investigation under section 77 of the Act in this case.

Internal review

77. NI Water advised the Commissioner that the complainant had not requested an internal review in relation to the first and third requests. However, the Commissioner notes that on 6 May 2010, the complainant emailed NI Water expressing his dissatisfaction with its response to the first request. On 18 June 2010 the complainant wrote

to NI Water questioning its response to his third information request and threatening to lodge a complaint with the Commissioner.

78. The Commissioner would draw NI Water's attention to the Code of Practice issued under section 45 of the Act, which sets out good practice in relation to internal reviews. Paragraph 38 of the Code states:

"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request should be treated as a complaint....."

79. The Commissioner believes that the complainant's emails of 6 May 2010 and 18 June 2010 clearly express dissatisfaction with NI Water's response to his requests. Therefore the Commissioner considers that NI Water ought to have interpreted both emails as complaints and therefore requests for internal reviews of its handling of the first and third requests. The Commissioner expects that, in its future handling of requests and complaints, NI Water will have regard for the recommendations of the Code in these matters.

Right of Appeal

80. 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

81. 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.
82. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22nd day of June 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General right of access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 10(1) provides that –

"Subject to subsection (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (c) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a

member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (d) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Offence of altering etc. records with intent to prevent disclosure

Section 77(1) provides that –

"Where –

- (e) a request for information has been made to a public authority, and
- (f) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled."

Annex A

The first request, submitted on 1 April 2010

"... I require all relevant correspondence, which for the avoidance of doubt includes, if not specified below, all records, minutes of meetings, documents, memoranda, emails and handwritten correspondence (to include drafts of each form of correspondence), in relation to the following:

1. *Copies of all notes and correspondence relating to discussions or meetings between Northern Ireland Water, the Regional Development Minister, Connor Murphy, and Paul Priestly of the Department of Regional Development between October 2009 to date at which any concerns were raised with regard to procurement issues within Northern Ireland Water and/ or to the corporate governance roles operated by its executive or non-executive directors.*
2. *Notes of all internal and external meetings attended by Laurence MacKenzie of Northern Ireland Water at which;*
 - (1) *corporate governance issues or concerns;*
 - (2) *the position and competency of Northern Ireland Water's executive and non-executive directors; and/or*
 - (3) *the decision to set up of an Independent Review*

were discussed, between October 2009 and March 2010.
3. *Copies of all notes and correspondence available to Northern Ireland Water which made reference to the prospect of setting up an Independent Review Team to assess Northern Ireland Water, including;*
 - (1) *details of when such meetings were held;*
 - (2) *who attended;*
 - (3) *where the meetings were held;*
 - (4) *minutes and draft minutes of such meetings (whether referred to in those meetings); and in addition,*
 - (5) *details as to the Independent Review group's designated purpose in relation to Northern Ireland Water.*

4. *All correspondence setting out the identity of the members of the committee which was set up to assess issues relating to Northern Ireland Water, including:*
 - (1) *details of their remuneration;*
 - (2) *their role within the committee; and*
 - (3) *the procedures to be used in order to appoint the members of the Committee.*

5. *Copies of all correspondence between Laurence McKenzie and Paul Priestly and / or Peter Dixon and/ Jackie Henry and / or Glenn Thompson from 1 September 2009 to date regarding procurement and corporate governance issues relating to Northern Ireland Water, all matters surrounding the evidence supplied to the IRT by Declan Gormley and all information related to the decision to exclude this from the record. Also all information in relation to the setting up of the independent review team, and the basis upon which the members of the team were to be selected and appointed.*

6. *Copies of all correspondence between Mark Ellesmere and/or Laurence McKenzie Paul Priestly/Peter Dixon/Jackie Henry/Glenn Thompson between December 1st 2009 and March 20th 2010.*

7. *Copies of all correspondence between the Chief Executive/General Consul and any third parties, at which the dismissal of non-executive directors was discussed; including:*
 - (1) *notes or minutes relating to the grounds for the proposed dismissals; and*
 - (2) *the procedure which was to be adopted in order to carry out the dismissals.*

8. *Given the need for transparency and openness in relation to the exercise of public powers, I believe that the public interest would be best served by the release of the material concerned as soon as possible; and in any event by 21 April 2010 in accordance with the Freedom of Information Act 2000".*

The second request, submitted on 30 April 2010

"...I require all relevant correspondence, which for the avoidance of doubt includes, if not specified below, all records, minutes of meetings, documents, memoranda, emails and handwritten correspondence (to include drafts of each form of correspondence), in relation to the following:

- 1. Copies of all notes and correspondence relating to discussions or meetings between yourself, and Paul Priestly/Leanne Patterson/Gary Fair of the Department of Regional development and Peter Dixon/Jackie Henry/Glenn Thompson of the Independent Review Team between September 2009 to date relating to all matters discussed pertaining to the function of the Audit Dept at Northern Ireland Water and the work undertaken by the Independent Review Team appointed by Mr. Priestly to investigate the matters unveiled by the Internal Audit which reported their findings to the Chief Executive of Northern Ireland Water on Friday January 15th.*
- 2. Notes of all internal and external meetings attended by yourself and Laurence MacKenzie of Northern Ireland Water, Paul Priestly/Leanne Patterson/Gary Fair of the Department of Regional Development, Peter Dixon/Jackie Henry/Glenn Thompson of the Independent Review Team at which:*
 - 1. Corporate governance issues or concerns*
 - 2. The position and competency of Northern Ireland Water's executive and non-executive directors, and/or*
 - 3. The decision to set up an Independent Review was discussed, between October 2009 and March 2010.*
- 3. Copies of all notes and correspondence available to you which made reference to the prospect of setting up an Independent Review Team to assess Northern Ireland Water including:*
 - 1. Details of when such meetings were held*
 - 2. Who attended*
 - 3. Where the meetings were held*
 - 4. Minutes and draft minutes of such meetings (whether referred to in those meetings) and in addition*
 - 5. Details as to the Independent Review group's designated purpose in relation to Northern Ireland Water.*
- 4. All correspondence between you and the members of the committee which was set up to assess issues relating to Northern Ireland Water including:*

1. *The nature of such correspondence*
2. *Copies of minutes in relation to your meetings with the IRT*
3. *Your contribution to the workings of the IRT*

5. *Copies of all correspondence between yourself and Laurence Mackenzie, Paul Priestly and/or Peter Dixon and Jackie Henry and/or Glenn Thompson from 1 September 2009 to date regarding procurement and corporate governance issues relating to Northern Ireland Water.*

6. *Copies of all correspondence, minutes, notes relating to your contact with Laurence MacKenzie, Paul Priestly and members of the IRT team other than those relating to you[r] formal interview by the IRT.*

7. *Copies of all correspondence between yourself and any third parties, at which the dismissal of non-executive directors was discussed including:*
 1. *Notes or minutes relating to the grounds for the proposed dismissals; and*
 2. *The procedure which was to be adopted in order to carry out the dismissals*
 3. *The position relating to Declan Gormley's proposed dismissal was discussed and your input regarding more appropriate sanction was discussed*
 4. *For the avoidance of doubt this request includes all correspondence, in any media sent and /or received which addressed your position in the IRT and confirming your retention in the post.*

Given the need for transparency and openness in relation to the exercise of public powers, I believe that the public interest would be best served by the release of the material concerned as soon as possible; and in any event by 21 April 2010 in accordance with the Freedom of Information Act 2000".

The third request, submitted on 8 May 2010

"I wish to obtain access to records relating to the following matters pursuant to the Freedom of Information Act 2000. I have had an opportunity to review the Northern Ireland Water Publication Scheme, which does not contain the information I require. I therefore look forward to receiving a response within 20 days of the date of this letter, confirming that you hold the information and to update me as to the current position. Should you require a fee to copy the relevant documents, please advise me by return.

I require all relevant correspondence, which for the avoidance of doubt includes, if not specified below, all records, minutes of meetings, file notes, documents, memoranda, emails and handwritten correspondence (to include drafts of each form of correspondence), in relation to the following:

- 1. Copies of all notes and correspondence relating to discussions or meetings between Laurence McKenzie/Nicola Brennan/Mark Ellesmere between September 2009 to date at which any concerns were raised with regard to procurement issues within Northern Ireland Water and/or to the corporate governance roles operated by its executive or non-executive directors. Including all correspondence in relation to issues identified and opinions expressed in relation to seriousness and potential causes.*
- 2. Notes of all internal and external meetings attended by Laurence MacKenzie of Northern Ireland Water and Peter Dixon of Phoenix Gas in relation to matters relating to:*
 - a. corporate governance issues or concerns regarding Northern Ireland Water*
 - b. the position and competency of Northern Ireland Water's executive and non-executive directors; and/or*
 - c. the decision to set up an Independent Review Team*
 - d. The Utility Regulator's role or that of his officials and how this could best be "managed" by both parties.*
 - e. The Utility Regulator's competence was a matter of concern/amusement*

were discussed, between October 2009 to date.
- 3. Copies of all notes and correspondence available to Northern Ireland Water /Laurence McKenzie regarding all*

conversations/meetings/telephone calls/file notes with the following members of DRD:

- a. Paul Priestley*
- b. Gary Fair*
- c. Lian Patterson*
- d. John Mills*

between July 2009 to date.

- 4. All correspondence /minutes/file notes/ diary records/advice provided to Laurence McKenzie by Colm Devine or other employees of Ernst and Young from July 2009 to date.*
- 5. Copies of all correspondence between Laurence McKenzie and Paul Priestly and / or Peter Dixon and/ Jackie Henry and / or Glenn Thompson from 1 September 2009 to date.*
- 6. Copies of all correspondence between Mark Ellesmere and / or Laurence McKenzie Paul Priestly/Peter Dixon/Jackie Henry/Glenn Thompson between October 1st 2009 to date.*
- 7. Copies of all correspondence relating to the meeting held in Room 222 Northland House on 7th December 2009 attended by Laurence McKenzie and others.*

I am specifically(but not exclusively) seeking copies of all file notes /aide memoires recorded by Laurence McKenzie in relation to telephone call/meetings with Paul Priestley/Gary Fair John Mills/Lian Patterson of DRD and Chris Mellor/John Ballard/Ruth Thompson/Declan Gormley.

Given the need for transparency and openness in relation to the exercise of public powers, I believe that the public interest would be best served by the release of the material concerned as soon as possible; and in any event by 6th June 2010 in accordance with the Freedom of Information Act 2000".

Annex B

Extract from Utility Regulator for Northern Ireland website on the Price Control 2010 – 2013 (PC10) process.

<http://www.uregni.gov.uk>

"PC10 is an acronym for Price Control 2010 – 2013, it is the process undertaken by the Northern Ireland Authority for Utility Regulation (NIAUR).

The Utility Regulator will be required to set price limits for NI Water from 1 April 2010 as part of our duty to protect customers who are served by a monopoly provider of water and wastewater services. We also have a duty to ensure that NI Water is able to finance their functions, including meeting its environmental obligations now and in the future. We will also seek to ensure that customers receive reliable services and value for money from the company.

The first price control (Price Control 2010 – PC10) will cover the three years from 1 April 2010 to 31 March 2013. We propose that subsequent price controls will cover five year periods. In undertaking this task, we will forecast the minimum revenue likely to be required by NI Water to run its business in an efficient and sustainable manner. We will also work with other key stakeholders to determine the service standards that we expect NI Water to deliver.

Before making our determinations on a price control, we require NI Water to submit a business plan which sets out the company's view of its revenue requirements to deliver against agreed standards. These standards are informed by legal requirements (for example, compliance with water and wastewater quality regulations) and guidance on social and environmental matters, issued by the Minister for Regional Development. The content of the company's plan is informed by our [PC10 Reporting Requirements](#) for any particular price control period."