

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2012

Public Authority: Northern Ireland Water
Address: Windsor House
9 – 15 Bedford Street
Belfast
BT2 7LT

Decision

1. The complainant made a freedom of information request to Northern Ireland Water for correspondence sent by named employees to officials within Northern Ireland's Department for Regional Development as well as information regarding procurement breaches within the company. Northern Ireland Water disclosed some information falling within the scope of the request but withheld other information by relying on the section 40 (personal information) and section 43 (commercial interests) exemptions. During the course of the Commissioner's investigation Northern Ireland Water said that it also wished to apply section 14(1) on the grounds that the request was vexatious.
2. The Commissioner's decision is that the request is vexatious within the meaning of section 14(1) and Northern Ireland Water was not obliged to comply with it. However, the Commissioner also found that in its handling of the request Northern Ireland Water breached sections 17(1) and 17(5) (Refusal of a request).
3. The Commissioner requires no steps to be taken.

Request and response

4. On 3 May 2011 the complainant made a freedom of information request to Northern Ireland Water which read as follows:
 - i. *All correspondence between the Company Secretary for Northern Ireland Water and the senior officials [named civil servants within*

Department for Regional Development] between Friday June 4th 2010 and Monday June 28th 2010.

- ii. All notes and correspondence to and from the said officials, in response to the correspondence from the Company Secretary of Northern Ireland Water, between these dates or afterwards, if relevant to original correspondence initiated by the Company Secretary of Northern Ireland Water.*
 - iii. All correspondence in relation to procurement breaches identified in relation to legal or other fees ,or any other procurement breaches, the value and number of these breaches and actions taken as a result of their identification which have occurred or been identified between August 1st 2010 to date.*
 - iv. Details of all contracts/projects awarded to Deloittes by N.I.W, their number and value from August 1st 2010 to date.*
 - v. All correspondence between the Company Secretary, Chairman of the Audit Committee [named individual], the Chairman and the Board, in relation to procurement breaches identified, their value and numbers between August 2010 to date.*
5. Northern Ireland Water issued a substantive response to the complainant on 24 June 2011. It disclosed a quantity of information falling within the scope of parts 1 and 2 of the request although information was redacted under the exemptions in section 40(2) (Personal information), section 42 (Legal professional privilege) and section 43 (Commercial interests). Information was also provided in response to part 4 of the request. As regards parts 3 and 5 of the request Northern Ireland Water explained that there had been no procurement breaches in the dates specified and that therefore it held no information.
6. The complainant subsequently asked Northern Ireland Water to carry out an internal review of its handling of the request. Where information was disclosed in response to parts 1 and 2 of the request the complainant asked Northern Ireland Water to review the decision to redact information and also questioned why it had not provided a specific piece of information which he described as "email correspondence between [a named individual] and [a named individual] dated June 18th 2010 regarding [a named individual]". The Commissioner understands that [a named individual] is the Secretary and General Counsel of Northern Ireland Water and [a named individual] is a civil servant with the Northern Ireland Department for Regional

Development. [a named individual] is a former Chief Executive of Northern Ireland Water.

7. The complainant also said that he did not agree with Northern Ireland Water's interpretation of what constituted a "procurement breach". He explained that the information he was seeking in relation to procurement breaches "would be consistent in interpretation with the definition applied to justify the dismissal of myself, and 3 of my colleagues, from the Board of NI Water last year". The complainant also said that he did not seem to have been sent any emails from or to a [a named individual] (a non-Executive Director of Northern Ireland Water) on this particular issue.
8. Northern Ireland Water presented the findings of its internal review on 29 July 2011 at which point it upheld the decision to refuse to disclose the redacted information. In response to the complainant's specific points it said that, as regards the email correspondence between [a named individual] and [a named individual] it could neither confirm nor deny whether this information was held because any such information would be deemed sensitive personal data and therefore section 40(5)(b)(i) would apply. It also said that it was maintaining its position on the definition of what constitutes a "procurement breach" and therefore continued to maintain that it held no information in relation to parts 3 and 5 of the request.

Scope of the case

9. On 1 August 2011 the complainant asked the Commissioner to review Northern Ireland Water's refusal of his request. He complained about the decision to refuse to disclose information falling within the scope of part 1 and 2 of the request and in particular the decision of Northern Ireland Water to refuse to confirm or deny if it held the specific email he referred to in his request for internal review. The complainant also challenged Northern Ireland Water's interpretation of "procurement breaches" in relation to parts 3 and 5 of the request as grounds for stating that no recorded information was held. Finally, the complainant said that he also wished to complain about the delay in responding to his request.

Reasons for decision

10. During the course of the Commissioner's investigation Northern Ireland Water said that whilst it maintained the position it had initially taken in response to the complainant's request it was also seeking to rely on

section 14 of FOIA as grounds for refusing the request on the basis that the request was vexatious. The Commissioner has considered the application of section 14 in the first instance as this exception can be applied to the request as a whole.

11. Section 14(1) provides that a public authority is not obliged to comply with a request if the request is vexatious. When considering whether a request can be reasonably characterised as vexatious the Commissioner's approach is to consider the context and history of the request to assess whether it would fall into one or more of the following factors.
 - whether compliance would create a significant burden in terms of expense **and** distraction
 - whether the request is designed to cause disruption or annoyance
 - whether the request has the effect of harassing the public authority or its staff
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable
 - whether the request has any serious purpose or value
12. It is not a requirement for all categories to be relevant to a request; however, where the request falls under only one or two categories or where the arguments sit within a number of categories but are relatively weak, this will affect the weight to be given to a public authority's claim that s.14 is engaged.
13. Northern Ireland Water's arguments as to why it considers the request to be vexatious are summarised below with the Commissioners observations under the relevant headings.

Significant burden

14. Northern Ireland Water has provided the Commissioner with a list of all the contact it has had with the complainant in relation to this request and related requests as well as compiling a bundle of internal correspondence generated in the course of dealing with the complainant's request which is the subject of this Decision Notice.
15. Having reviewed the bundles of documents provided by Northern Ireland Water it would appear that the complainant has submitted 9 separate requests for information from April 2010 until this request in May 2011, although each request is itself made up of multiple requests. The requests are rarely straightforward and are in each case a series of requests for information or questions relating to corporate governance

of Northern Ireland Water, procurement issues and issues surrounding the complainant's dismissal as a non-executive director.

16. The complainant has had further contact with Northern Ireland Water over this period but rather than formal requests for information such contact is better described as requests for updates on progress or seeking clarification on answers given in response to his formal freedom of information requests.
17. Northern Ireland Water has said that the complainant's related requests have imposed a significant burden in terms of expense and distraction which could be seen from:

"...the volume of requests, the scope of questions, sub-questions and hence the sheer volume of information searched for, retrieved and provided to [the complainant]. This amounts to several thousand pages of information representing hundreds of man hours.

Responding to these FOI requests has required substantial effort from many NI Water staff including senior management in terms of identifying copious amounts of information to the detriment of company business."

Designed to cause disruption or annoyance

18. For this heading Northern Ireland Water pointed to the fact that the complainant's requests overlapped, so often more than one request was being responded to at any one time. It also said that the complainant's queries are numerous and refer to multiple requests and this had led to confusion on the part of Northern Ireland Water.

Has the effect of harassing the public authority or its staff

19. Northern Ireland Water has argued that the focus of the complainant's requests, in its view, is to target members of staff whom he considers to be linked to his removal as a non-executive member of the Northern Ireland Board, in particular the then Chief Executive [a named individual] who was referred in this request. It said that the complainant had consistently asked for information which specifically refers to [a named individual] or is in reference to actions taken by [a named individual]. Some of these requests, it said, specify emails where the date, time and recipients is described by the complainant which would suggest that on occasion he is seeking information already held.
20. Northern Ireland Water also referred the Commissioner to examples of where it said the complainant had sent emails requesting a reply within

24 hours or had queried responses to requests with accusations that information was being deliberately withheld. It described the complainant's communications as having "a condescending and accusatory tone" and in one case described one email as being "very abrasive" which had placed undue stress on a member of staff.

Obsessive or manifestly unreasonable

21. Northern Ireland Water said that the complainant's request followed a similar theme whereby a group of staff are identified and a range of dates where all correspondence between them is requested. The requests focus on procurement issues and staff within Northern Ireland Water and the Department for Regional Department (Northern Ireland Water's sponsoring department) whom the complainant feels are directly or indirectly linked to his removal.

Any serious purpose or value

22. Northern Ireland Water suggested that there was no serious purpose or value to the request as the issues regarding procurement within the company which led to the complainant's removal from the board had already been considered by a number of independent investigations.

The complainant's view

23. The Commissioner, having informed the complainant of the fact that section 14 had been applied to his request retrospectively, invited him to make any representations in support of his complaint and to challenge Northern Ireland Water's argument that his request could be considered vexatious. The complainant now said that he had been forced to make a number of FOI requests because of Northern Ireland's failure to provide information. He said that he had been misled about the existence of certain information and that he had had to make alternative requests with alternative wording in order to obtain information. Had his requests been dealt with in an open and transparent manner he would not, he said, have had to pursue matters in such a determined manner.

24. As to the substance of his requests the complainant said that he believed the information he was seeking was of public interest. In particular, for his requests for emails regarding the former Chief Executive, he suggested that, if the information was held, disclosure would serve a legitimate public concern in knowing whether or not the head of Northern Ireland's largest utility was able to fulfil his role.

The Commissioner's view

25. First of all the Commissioner would say that he is not satisfied that the complainant's request was designed to cause annoyance or has no serious purpose or value. Whilst the effect of dealing with the request has been burdensome for Northern Ireland Water the Commissioner does not accept that the complainant's intention was to deliberately inconvenience the company. Similarly the Commissioner is of the view that any information falling within the scope of the requests would increase transparency and accountability with regard to problems within the corporate governance of Northern Ireland Water, notwithstanding the fact that these issues have already been considered by a number of independent investigations within Northern Ireland. The Commissioner is satisfied that the complainant's motivation for making his request is sincere.
26. However, it is clear to the Commissioner that dealing with the complainant's requests has placed a considerable burden on Northern Ireland Water to the extent that members of staff have been working on administering the requests or responding to the complainant's communications for over a year, at times on an almost daily basis. Furthermore, this burden has not been confined to the company's Information Management Unit but due to the nature of the requests has involved individuals from across the organisation and particularly at the boardroom level. The overlapping nature of the requests also makes it more difficult and confusing for Northern Ireland Water to respond and this has caused a distraction from the company's core functions.
27. The Commissioner has some sympathy with the complainant's argument that he has been forced to persistently make requests and contact Northern Ireland Water because of their failure to respond to his requests properly. The Commissioner is aware that the responses to some of the requests have not always been satisfactory and would accept that this case is one which is finely balanced. However, taking all the circumstances into account the Commissioner's view is that the complainant's request can be seen as the continuation of a pattern of behaviour that is obsessive. The requests all focus on the same themes and Northern Ireland Water's responses to requests for information have only prompted more requests. The complainant often does not accept the responses he has received and asks to be told who has cleared the response or who is responsible for the accuracy of the information. This would point to the obsessive nature of the request.
28. The Commissioner has also taken into account the fact that the complainant has repeated some of his requests to Northern Ireland Water and notes that the complainant has requested some of the

information covered by the request which is the subject of this decision notice from another public authority. This would also point to the obsessive nature of the complainant's request.

29. Whilst clearly frustrated at the failure to secure information to which he feels he is entitled this has taken the form of very demanding communications which at times, as Northern Ireland Water has highlighted, takes an abrasive, accusatory or condescending tone. The effect of this coupled with the volume of the communications could, the Commissioner considers, reasonably lead to employees of Northern Ireland Water feeling harassed.
30. The Commissioner is aware that the complainant has alleged that information had been disclosed to him in response to a request after he had previously been advised that the information was not held. In at least one instance referred to by the complainant, the Commissioner would point out that whilst it would appear that some emails were subsequently disclosed after he had been informed they were not held, this was only after they had been retrieved from a back up tape due to the complainant specifically identifying emails he wanted to see – as he was able to do given his familiarity with the company. The Commissioner takes the view that information which has been deleted in the normal course of business is not held for the purposes of FOIA even if it is still technically recoverable. In this case Northern Ireland Water explained that to be as open and transparent as possible it had arranged for back up tapes to be searched for specific emails requested by the complainant which involved significant expense and the use of specialist staff and software.
31. Whilst acknowledging that the case is finely balanced the Commissioner is of the view that when viewed in the context of the complainant's previous requests and communications with Northern Ireland Water the request has imposed a significant burden, has at times had the effect of harassing Northern Ireland Water and can be seen as obsessive. For these reasons the Commissioner has decided that the request of 3 May 2011 can be fairly characterised as vexatious and therefore section 14(1) is engaged.

Section 10 – Time for compliance

Section 17 – Refusal of request

32. The complainant also asked the Commissioner to consider the delay in handling his request.

33. Section 10(1) provides that a public authority shall comply with section 1 of FOIA promptly and in any event within 20 working days. In this case the request was submitted on 3 May 2011 but a response was not received until 24 June 2011. However, since the Commissioner has decided that Northern Ireland Water was not obliged to comply with the request there is no breach of section 10 for failing to comply with section 1 within 20 working days. However Northern Ireland Water will have breached section 17 of FOIA for failing to inform the complainant of its reasons for refusing the request within 20 working days.

34. Section 17(1) provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

35. In addition section 17(5) provides that:

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

36. In this case Northern Ireland Water failed to inform the complainant that it was applying the section 40, section 40(2) and section 43 exemptions within 20 working days and section 14(1) was first cited during the course of the Commissioner's investigation. Therefore, by failing to inform the complainant that it was relying on these sections, within 20 working days of receiving the request, Northern Ireland Water breached sections 17(1) and 17(5) of FOIA.

Right of appeal

37. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Pamela Clements
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