

THE TRANSPARENCY AGENDA IN WATER UTILITIES REGULATION AND THE ROLE OF FREEDOM OF INFORMATION: ENGLAND AND JAKARTA CASE STUDIES

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1 INTRODUCTION

The water supply sector is suffering from the lack of governance and economic regulation is failing in many instances.¹ Establishing a transparency mechanism is a way to tackle these problems. 'Transparency' in this context is defined as the public disclosure of information which is essential to enable governance and support economic regulation. The ways in which a legal framework addresses this problem vary according to ownership and regulatory models of water services. Transparency mechanisms can be detailed in legislation, contained implicitly in the discretionary power of the regulator or stipulated in contracts.

This article compares the role of freedom of information legislation in advancing the transparency agenda in the water services sector in two jurisdictions, England and Jakarta, Indonesia, where services are privatised but with different models. In the former case, there is an independent regulator with a powerful legal mandate and wide discretionary power, while in the latter, the independent regulator has no legislative mandate and concession contracts are used as the primary instrument of regulation. The reason for comparing the two jurisdictions is because the literature suggests that in cases where contracts are used as the primary instrument of regulation, transparency may reduce.² In that situation, transparency mechanisms may need to rely on the general administrative law framework. It is argued here that irrespective of any model of ownership or regulation, freedom of information legislation could be used as a tool to enhance transparency. This, however, is subject to limitation as the legislation contains clauses which exempt certain information from being disclosed.

2 THE PROBLEMS IN WATER UTILITIES REGULATION

2.1 Failure of governance

The Global Water Partnership (GWP)³ and the Camdessus report⁴ stated that the water crisis is mainly a crisis of governance. Transparency, as well as participation and accountability, has been identified as the key to good governance.⁵ One of the principles for 'effective water governance' is that it should be 'open and transparent', in that language should be accessible and understandable and all policy decisions should be transparent, particularly with regard to financial transactions.⁶

While transparency itself is a broad concept, it has been defined as 'a process by which information about existing conditions, decisions and actions is made accessible, visible and understandable'.⁷ Transparency and accountability '... are built on the free flow of Information'.⁸ The preamble of the Aarhus Convention states transparency as one of its purposes, and, as the title of the Convention suggests, this is established by enabling 'access to information'.⁹

There has been concern over the lack of transparency in water services from around the world: Bolivia,¹⁰ Budapest,¹¹ Johannesburg,¹² Jakarta,¹³ Malaysia,¹⁴

3 Global Water Partnership *Towards Water Security: A Framework for Action* (GWP 2000).

4 M Camdessus, J Winpenny 'Financing Water for All: Report of the World Panel on Financing Water Infrastructure' (World Water Council and GWP 2003) 2.

5 M Godbole *Public Accountability and Transparency: The Imperatives of Good Governance* (Orient Longman New Delhi 2003) 196–266.

6 P Rogers, A Hall *Effective Water Governance* TEC Background Paper No 7 (GWP Stockholm 2003) 27.

7 International Monetary Fund 'Reports on the International Financial Architecture by the G22 Working Group on Transparency and Accountability, Working Group on Strengthening Financial Systems and Working Group on International Financial Crises' (October 1998) <http://www.imf.org/external/np/g22/index.htm>.

8 Rogers, Hall (n 6) 28.

9 UNECE Convention on Access to Information, Public Participation in Decision-Making and Environmental Matters (25 June 1998) (1999) 38 ILM 517 available at <http://www.unece.org/env/pp/treatytext.htm>.

10 "Pro-Poor" Water Privatisation: Ideology Confounded in Bolivia?' (2003) <http://www.id21.org/society/s8an1g1.html>.

11 E Lobina 'Problems with Private Water Concessions: A Review of Experiences and Analysis of Dynamics' in A K Biswas and C Tortajada (eds) *Water Pricing and Public-Private Partnership* (Routledge London 2005).

12 D McKinley 'Water Is Life: The Anti-Privatisation Forum and the Struggle against Water Privatisation' Public Citizen (2003).

13 A Harsono 'Water and Politics in the Fall of Suharto' The Center for Public Integrity (2003) <http://www.publicintegrity.org/water/report.aspx?aid=52>.

14 'Watchdog: Why is Water Deal under Osa?' Malaysiakini (19 July 2007) <http://www.malaysiakini.com/news/62323>.

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1 N Prasad 'Going Beyond Regulation: Social Policies and Private Sector Participation in Water Supply' (IELRC Workshop on the Legal Aspects of Water Sector Reforms Geneva 2007) 8 http://www.ielrc.org/activities/workshop_0704/content/d0720.pdf.

2 See for example M J Rouse *Institutional Governance and Regulation of Water Services: The Essential Elements* (IWA Publishing London 2007) at 26–8 and 158; L Bertolini 'How to Improve Regulatory Transparency' PPIAF Gridlines Note 11 (2006); NERA Economic Consulting *Regulatory Transparency: International Assessment and Emerging Lessons* (NERA London 2005) 18; R Simpson 'Down and Dirty: Providing Water for the World' (2004) 14 Consumer Policy Review 146–52.

China¹⁵ and the Czech Republic.¹⁶ Even in a country with an advanced regulatory system such as the United Kingdom, the House of Commons Select Committee on Environmental Audit still deemed that Ofwat is unable to strike '... the right balance between commercial confidentiality and operational transparency'.¹⁷ The Interfaith Center on Corporate Responsibility (ICCR) – which represents over \$100 billion in invested capital – concludes that disclosure by water utilities on environmental, social and governance information is 'murky',¹⁸ warning investors to be cautious and – in the absence of a mandatory disclosure requirement – to take extra care to compel companies to disclose more.¹⁹

Privatisation of networked water utilities is criticised for reducing the level of transparency. Swyngedouw suggests that this is caused by the commodification of information that was formerly in the public domain, for example through the principles of business secrecy.²⁰ In turn, this limits access to data and information required by stakeholders. However, commodification may not be the only reason why information is kept secret. In some cases the pretext of confidentiality is also used by governmental agencies as a shield against political or commercial embarrassment.²¹ Critics add that public private partnership fails to transfer knowledge from multinational companies to their local partner. Multinationals will only be keen to transfer a limited extent of technical knowledge which does not endanger their superior position with their local partner.²² According to Lobina and Hall, 'commercial operations invariably prefer confidentiality and secrecy, as it protects their ability to manage financial affairs to maximise the benefit to their owners'. Furthermore, they argue that private actors will often have control over who has access to the text of concessions.²³

2.2 Economic regulation and its problems

Regulation occurs when market participants, left to their own devices, are not able to meet certain objectives which are thought to be for the general good of the society. These 'objectives' may vary

depending on the market structure and industry sector. In the water utilities sector, the industry is characterised by the natural local monopoly feature of its network,²⁴ the make up of water as a merit good, and environmental concerns attached to water provisions.

A natural local monopoly means that it is more efficient for one region to be served by a single firm. Because of this, water consumers face difficulties in exiting from the market. One of the objectives of regulatory intervention in this case is in constraining the utility from abusing its dominant position.

Water as a merit good denotes that it is a precondition for a decent life. The right to the enjoyment of water is considered to be attached to any person by birth, irrespective of his or her ability to pay. As a merit good, under-provision of water results in undesirable consequences, such as problems with public health, which, if not properly addressed, will decrease the society's overall welfare. The role of regulation is in ensuring that everyone, irrespective of financial capability, would be able to have access to sufficient and safe water.²⁵ One way this is achieved is by obligating water utilities to extend services to unprofitable areas and applying solidarity tariffs.

The provision of water services is strongly interrelated to environmental conditions. Access to a water source, quality of bulk water, climatic conditions and the treatment of wastewater all have cost implications to consumers. The lower the quality of effluent discharged to the environment, the more expensive its treatment cost.

In order to achieve the above objectives, economic regulation is applied to the water services sector. A regulator is installed to supervise, monitor, enforce penalties and set tariffs. Between the regulator and the utilities, there is a prevalent problem of information asymmetry where the utilities always have more information about the work they are doing than the regulator and, as such, have the incentive to deceive in order to maximise their own welfare. What needs to be done in this case is to make information available to the regulator,²⁶ which could be done by facilitating competition, applying incentive regulation and conducting information gathering.²⁷

Facilitating competition may not be feasible in large parts of the water services sector due to economies of scope and scale. Applying incentive regulation may, in theory, reveal information about a regulated industry. However, in practice, whether in the form of rate of return or price cap, incentive regulation has its own basic informational need which requires direct

15 G Yun 'Rethinking China's Urban Water Privatization' Xinjiang Conservation Fund (2008) http://www.waterjustice.org/?mi=1&res_id=245.

16 H Skapová (ed) *Water Industry Privatisation in the Czech Republic: Money Down the Drain?* (Transparency International – Czech Republic (TIC) Prague 2009).

17 'House of Commons, Environmental Audit, Seventh Report' <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmenvaud/597/59703.htm>.

18 Interfaith Center on Corporate Responsibility 'Water Company Disclosure is Murky, Investors Must Press for Major Improvements in Investor- and Publicly-Owned Utilities' Reporting' News/Media: Press Releases http://www.iccr.org/news/press_releases/2009/pr_liquidassets07.22.09.htm.

19 ICCR 'Liquid Assets. Responsible Investment in Water Services' The Corporate Examiner Special Edition 2009.

20 E Swyngedouw 'Dispossessing H2O: The Contested Terrain of Water Privatization' (2005) 16 *Capitalism, Nature, Socialism* 81–98.

21 S Zifcak 'Contractualism, Democracy and Ethics' (2001) 60 *Australian Journal of Public Administration* 86–98.

22 E Lobina, D Hall 'Problems with Private Water Concessions: A Review of Experience' (Public Services International Research Unit Report 2003) <http://www.psiru.org/reports/2003-06-W-over.doc> 16–19.

23 *ibid.*

24 A Jouravlev 'Water Utility Regulation: Issues and Options for Latin America and the Caribbean' UN Economic Commission for Latin America and the Caribbean LC/R.2032 (11 October 2000) 6.

25 J B Opschoor 'Water and Merit Goods' (2006) 6 *International Environmental Agreements: Politics, Law and Economics* 423–8.

26 For a general discussion on Principal-Agent relationships in the context of regulation, see J Laffont, J Tirole *A Theory of Incentives in Procurement and Regulation* (MIT Press Cambridge Mass 1993).

27 P Burns, A Estache 'Infrastructure Concessions, Information Flows, and Regulatory Risk' Public Policy for the Private Sector Note 203 (1999).

auditing.²⁸ There is no way to get away from information asymmetry as, irrespective of any formula used, the regulator will always be required to audit the company. Hence, information gathering will always be a substantial part of the regulation process.²⁹

As regulators often have lack of capacity and resources in interpreting the information and as their decision is susceptible to capture, it is necessary to disclose the information to allow stakeholders to be involved. The public, notwithstanding their diverse interest and lower per capita gain in intervening in the regulatory process, consists of a pool of different parties which has an interest in information regarding the utility.³⁰ Stakeholders can form alliances and contribute their knowledge to scrutinise the information in the regulatory process. Disclosure would (i) aid the regulator in deciphering information derived from the utility, (ii) allow stakeholders to propose alternative policy, (iii) create incentives for the utility to improve accounting quality, (iv) prevent collusion and corruption between regulator and the utility and (v) develop the industry by sharing best-practices and 'know how' and therefore lower the barriers to entry.

Unfortunately, not all of the information submitted by utilities to the regulator is available for public disclosure. They may be restricted by sectoral regulation or there may be an obligation of confidence preventing the regulator from disclosing it to the public.

3 FREEDOM OF INFORMATION LAWS IN ENGLAND AND INDONESIA

Many reports and literature appeal to legal frameworks on disclosure, such as freedom of information (Fol) laws, in order to enhance transparency in water services. Transparency International stresses that 'strong' Fol legislation '... provides the foundation for transparency in the water sector'.³¹ The Padco Report – facilitated by USAID to attract private investment – also relies on Fol laws, 'sunshine' rules (open meeting rules) and capital market regulation for listed companies, citing the US experience.³² Graham and Prosser

contrasted the US condition with the United Kingdom, where not even a minimal sunshine rule was discussed following the divestiture process.³³ Many other commentators praise the US model of regulation which obliges regulators to comply with sunshine laws³⁴ and report ex parte contacts.³⁵

Both the United Kingdom and Indonesia have enacted Fol legislation. The Freedom of Information Act³⁶ was enacted in 2000 and is valid for the whole of the United Kingdom except Scotland. Environmental information is covered by the Environmental Information Regulations (EIR)³⁷ which have broader coverage than Fol laws since they apply not only to government institutions but also private water companies.³⁸ Privatised utilities are not covered by the English Fol Act at present; however, a discussion is currently underway to include utilities as a public authority under the Fol regime.³⁹ Nevertheless, utilities information can be recovered through regulators, which are a public body under English Fol. English Fol contains a requirement for public bodies to implement a publication scheme⁴⁰ which must be approved by the Information Commissioner or can alternatively follow the existing model of publication scheme applicable to its class. The English economic regulator Ofwat⁴¹ applied the Information Commissioner's Model Publication Scheme for Non-Departmental Public Bodies (NDPB), which lists mandatory publications ranging from customer service information, lists of awarded contracts and their values and the regulator's decisions.⁴² Ofwat's implementation of the NDPB scheme is actually much wider than what is required by the model as it encompasses items ranging from financial information, regulatory accounts and price setting to customer information.⁴³

Indonesia enacted its Undang Undang Keterbukaan Informasi Publik (literally translated: The Law on the Openness of Public Information) in 2008.⁴⁴ The Indonesian Fol came into force on 30 April 2010. At present, the Indonesian Government is still preparing to establish the institutions in support of Fol, such as

28 In rate of return, the base rate needs to be determined and the determination of base rate requires inquiry into historical company performance. In price cap, the efficiency factor (X or K in the water sector) is vulnerable to capture. The price cap system is considered to be vulnerable to capture because of the high degree of regulatory discretion and the closeness to high-powered incentive scheme. See Jouravlev (n 24) 54.

29 R Green, M R Pardina *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (World Bank Washington DC 1999) 15–17.

30 F Boehm 'Anti-Corruption Strategies as Safeguard for Public Service Sector Reforms' (Internet Centre for Corruption Research (ICGG) Working Paper 2007), available at www.icgg.org/downloads; also F Boehm 'Regulatory Capture Revisited – Lessons from Economics of Corruption' (ICGG Working Paper 2007).

31 'Global Corruption Report 2008: Corruption in the Water Sector' (Transparency International 2008).

32 PadCo 'A Review of Reports by Private-Sector-Participation Skeptics' Prepared for Municipal Infrastructure Investment Unit (MIU), South Africa and The United States Agency for International Development (USAID) Contract No 674-0312-C-00-8023-0 (February 2002) <http://www.psiu.org/others/PadcoSkeptics.doc>. See also D Hall 'Secret Reports and Public Concerns. A Reply to the USAID Paper on Water Privatisation "Skeptics"' (Public Services International Research Unit (PSIRU) 2002).

33 C Graham, T Prosser *Privatizing Public Enterprises: Constitutions, the State, and Regulation in Comparative Perspective* (Oxford University Press New York 1991) 226.

34 G Palast, J Oppenheim, T MacGregor *Democracy and Regulation: How the Public Can Govern Essential Services* (Pluto Press London 2003).

35 W P Olson 'Secrecy and Utility Regulation' (2005) 18 *The Electricity Journal* 48–52.

36 Freedom of Information Act (England) 2000 ch 36 (English Fol Act).

37 The Environmental Information Regulations 2004 SI 2004/3391.

38 See the decision of the Information Commissioner on the applicability of EIR to Sutton and East Surrey Water Plc dated 19 March 2008 http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0118853.pdf.

39 'Freedom of Information Act 2000: designation of additional public authorities – Ministry of Justice.' <http://www.justice.gov.uk/consultations/cp2707.htm>.

40 English Fol Act (n 36) s 19.

41 The statutory name is the 'Water Services Regulatory Authority'. See Water Act 2003 ch 37 (WA 2003) s 34.

42 Information Commissioner's Office 'Model Publication Scheme for Non-Departmental Public Bodies' http://www.ico.gov.uk/what_we_cover/freedom_of_information/publication_schemes/definition_document_ndpb_england.aspx.

43 Ofwat 'Freedom of Information' <http://www.ofwat.gov.uk/about/ofwat/foi/>.

44 Undang Undang Keterbukaan Informasi Publik No 14 Tahun 2008 (Indonesian Fol Law).

the Information Commission. Because of this, analysis of Indonesian FoI legislation in this article will be based on the interpretation of primary legislation, with no case law as yet. The Indonesian FoI is applicable to the judiciary, executive and the legislative branches of the government and other institutions financed either partially or in entirety through the state budget. This will cover regulators and state-owned regional water-work companies or Perusahaan Daerah Air Minum (PDAM)⁴⁵ but will not cover concession partners of the PDAM as they are purely private entities operating under their own budget. Regulators and PDAM must publish information every six months relating to their performance and finances in a comprehensible manner.⁴⁶ In addition, there is an obligation to make certain information available at all times, such as all policies and supporting documents, agreements with third parties (this presumably may include water concession contracts but there are technicalities which may prevent this from occurring as will be discussed below) and procedures relating to public services.⁴⁷

4 REGULATORY STRUCTURE IN ENGLAND AND INDONESIA

The task of economic regulation in England is carried out by Ofwat⁴⁸ (and for certain issues can be referred to the Competition Commission⁴⁹). Environmental regulation is carried out by the Environment Agency and the water quality regulator is the Drinking Water Inspectorate. Ofwat regulates 21 regional monopoly water companies in England and Wales, where 10 of them provide both water and sewerage services and 11 are water only companies. All of the companies are fully divested. Ofwat is tasked with approving prices that companies can charge,⁵⁰ encouraging competition, monitoring service levels and enforcing actions against the companies.

In the Jakarta model, water utilities are state owned. However, Jakarta's PDAM (PAM Jaya) entered into a concession contract with two private companies (the concessionaires). The network is owned by PAM Jaya and operated by the concessionaires but will be transferred back after the 25-year concession contract (which started in 1998) ends. The formula for tariff setting is stipulated in the contract. Nevertheless, the Jakarta local government has the final say on determining the tariff.⁵¹ Due to a history of disputes, an

independent regulatory body, the Jakarta Water Supply Regulatory Body (JWSRB) was set up to mediate disputes between PAM Jaya/Jakarta local government and the concessionaires. The JWSRB's power is limited, however, to advising the government on tariffs, receiving customer complaints and mediating disputes occurring between PAM Jaya and the concessionaires. Hence, in the Jakarta model, the Jakarta local government, JWSRB⁵² (to a very limited extent) and PAM Jaya are the de facto economic regulators. The quality regulator is the Ministry of Public Health⁵³ and the environmental regulator is the State Ministry of Environment.⁵⁴

England has enacted water services laws. The Water Industry Act of 1991⁵⁵ was amended in 1999⁵⁶ and in 2003.⁵⁷ Indonesia has not enacted a water services law. There is only one article in the 2004 Water Resources Law which regulates water services⁵⁸ and a Government Regulation which regulates water services only broadly.⁵⁹ In the absence of a distinct water services law, the rights and responsibilities of water utilities and their legal relationships with consumers and regulators are regulated (in Jakarta) primarily through the concession contract.

5 THE TRANSPARENCY AGENDA IN THE WATER SERVICES SECTOR

5.1 Why transparency in the water services sector?

According to Weil, transparency frameworks in general have various motives ranging from the improvement of allocative efficiency, enhancing performance of an organisation through benchmarking, addressing social objectives and enabling an effective governance system.⁶⁰ This article will further specify governance criteria into participation, accountability, anti-corruption efforts and establishing regulatory credibility and predictability.

Improvement of *allocative efficiency* is one of the most discussed purposes of transparency. The aim is to redress information asymmetry between parties involved in a transaction in a competitive market.⁶¹ The role of the law in this case is in correcting market failure by redressing information asymmetry either, for

45 PDAMs are regional owned waterwork companies. They are established through regional by-laws and financed through regional government's budget. See Indonesian Law No 5 Year 1962 on Regional Companies.

46 Indonesian FoI Law (n 44) art 9.

47 *ibid* art 11.

48 WA 2003 (n 41) s 34, s 36 and sched I; also Water Industry Act 1999 ch 9 (WIA 1999) s 2 and ss 142–50.

49 WIA 1999 (n 48) ss 12–14.

50 *ibid* s 11.

51 The concession contract affirms that tariff levels are determined by the Jakarta Governor and the local parliament. See O Jensen 'Troubled Partnerships: Problems and Coping Strategies in Jakarta's Water Concessions' (Paper presented at the 4th Conference on Applied Infrastructure Berlin 8 October 2005). See also Minister of Home Affairs Regulation No 23 Year 2006 concerning technical guideline and procedure for water tariff setting at the local waterworks enterprise, art 21(1), which requires the approval of regional heads (governors or mayors as the case may be) in setting tariffs.

52 The mandate is outlined in the concession contract and Jakarta Governor Regulation no. 54/2005. See also A Lanti 'A Regulatory Approach to the Jakarta Water Supply Concession Contracts' (2006) 22 *International Journal of Water Resources Development* 255–76.

53 Government Regulation 16 Year 2005 on the Development of Drinking Water Provision System (GR 16/2005) art 6.2. See also Minister of Health Regulation 907/MENKES/SK/VII/2002.

54 GR 16/2005 (n 53) art 17.

55 Water Industry Act 1991 ch 56 (WIA 1991).

56 WIA 1999 (n 48).

57 WA 2003 (n 41).

58 Indonesia, Law No 7 Year 2004 on Water Resources (Law 7/2004) art 40.

59 GR 16/2005 (n 53).

60 D Weil 'The Benefits and Costs of Transparency' (Working Paper Transparency Policy Project Taubman Center John F Kennedy School of Government 2002).

61 G A Akerlof 'The Market For "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488–500.

example, by obligating disclosure of information which has significant impact for the other party or by encouraging one party to conduct an information search.⁶² Note that this type of regulation depends on the ability of the buyer to 'exit' from the market. If a seller, motivated by the law, discloses information about the hidden defects of the good being sold, the buyer can then decide to 'exit' by moving to another seller. Regulatory frameworks for this type of market may not be entirely relevant in natural monopolies in which customers have no exit option, such as water services. Arguably, however, if there is an agenda of water sector liberalisation, there are certain parts of the market where the customer has some limited option to exit by moving to another supplier.⁶³

Enhancing the performance of the institution through *benchmarking* is another motive for transparency. The assumption behind this motive is that disclosure of certain information will compel institutions to change their behaviour. A common method for this is to compare the performance of the institution with another institution delivering similar services using a set of indicators. It is hoped that, through the benchmarks, the public would be able to influence the behaviour of such firms. Benchmarking is undertaken both internationally⁶⁴ and regionally.⁶⁵ It could be effective when conducted in an adequate 'naming and shaming' framework that would involve internal 'carrot' (for managers) and external 'stick' (from municipalities).⁶⁶ Following the success of a voluntary benchmarking program, the Netherlands finally formalised 'sunshine' regulation for its water companies, making benchmarking programs mandatory. It has been argued that this method offers a low-cost and light-touch approach to regulation⁶⁷ and could be more effective than England's style of price regulation.⁶⁸

Another regulatory intent for transparency is in advancing *social objectives*.⁶⁹ Water utilities may have a

duty to provide universal coverage and one of the purposes of water services regulation is in preventing social exclusion which may occur due to discriminatory network expansion or unaffordable tariffs. The UN's General Comment 15 affirms that access to water and water facilities and services should be realised without discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and calls for a '... full and equal access to information concerning water, water services and the environment, held by public authorities and third parties.'⁷⁰

Participation in water utilities regulation requires information. According to an OECD report, it is a basic prerequisite of participation that complete, objective, reliable, relevant and understandable information is provided to citizens.⁷¹ In the England/Wales water supply sector, there was criticism that the consumer's representative body, the customer services committee (CSC), lacked statutory power of access of information to water utilities and relied primarily on information supplied by the regulator.⁷² In turn, the CSC complained that Ofwat did not release sufficient information to allow it to make informed comment.⁷³ The CSC was turned into an independent body separated from Ofwat, the Consumer Council for Water (CC Water), in 2003.⁷⁴ CC Water has statutory authority to request information from utilities. However, some are sceptical and consider that the separation of CC Water from Ofwat will weaken its information base.⁷⁵

Transparency is also intertwined with accountability. The common agreed definition of *accountability* is when certain institutions can be held to explain their actions. The notion itself has undergone expansion of meaning which makes it synonymous with the ideas of responsibility, responsiveness or dialogue, among others.⁷⁶ In practical terms however, the notion correlates with institution, mechanisms, procedures and sanctions which are imposed externally on those holding power.⁷⁷ The idea of accountability therefore is highly related to the exchange of information

62 For example, see A T Kronman 'Mistake, Disclosure, Information, and the Law of Contracts' (1997) 2 International Environmental Agreements: Politics, Law and Economics 31–64 and R A Posner *The Economics of Justice* (Harvard University Press Cambridge MA 1981).

63 M Cave 'Independent Review of Competition and Innovation in Water Markets' (Department for Environment, Food and Rural Affairs London November 2008) 8.

64 The IB-Net use indicators such as service coverage, consumption production, cost and staffing, affordability of services to assets, each detailed into another set of indicators: The International Benchmarking Network for Water and Sanitation Utilities <http://www.ib-net.org/en/ibnet-toolkit/ibnet-toolkit/index.php?L=2&S=3>.

65 Regional benchmarking in Southeast Asia is performed by SEAWUN and nine Indonesian regional state-owned water utility/PDAMs followed the program, but not Jakarta. See SEAWUN 'Official Members' <http://seawun.org/index.php?page=member-benefit>.

66 K De Witte *On Analyzing Drinking Water Monopolies by Robust Non-Parametric Efficiency Estimations* (PhD University of Leuven 2009) 81.

67 D Saal and K De Witte 'Is a Little Sunshine All We Need? On the Impact of Sunshine Regulation on Profits, Productivity and Prices in the Dutch Drinking Water Sector' (2009) 20 Journal of Regulatory Economics 61–90.

68 De Witte (n 66) at 122, 205. The Dutch benchmarking program compares cost, quality and service levels among utilities and publishes them regularly. Utilities managers will receive blame or praise as a follow up of this report. Unlike England's regulatory method, the benchmark is not followed by price regulation.

69 The Home Mortgage Disclosure Act 1975 (US) obliges lenders to

disclose amount of loans disbursed by local lending institutions to individuals or communities with the purpose of avoiding discriminatory lending practices. The Worker Adjustment and Retraining Notification Act 29 USC §§ 2101 to 2109 obligates employers to disclose plans for the closure of facilities to workers: Weil (n 60).

70 UN Committee on Economic, Social and Cultural Rights General Comment 15 'The Right to Water' UN Doc E/C.12/2002/11, available at www.ohchr.org/english/bodies/cescr/comments.htm.

71 J Caddy, C Vergez 'Citizens as Partners: Information, Consultation and Public Participation in Policy-Making' (Organisation for Economic Co-operation and Development PUMA Working Group on Strengthening Government-Citizen Connections 2001) 12, 38–45, available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/4201131E.PDF>.

72 B Page, K Bakker 'Water Governance and Water Users in a Privatised Water Industry: Participation in Policy-Making and in Water Services Provision: A Case Study of England and Wales' (2005) 3 International Journal of Water 38–60.

73 'Report into the Conduct of the 2004 Ofwat Periodic Review' (Ofwat Independent Steering Group August 2005) 30 [http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pr04_review_ofwat_report110805.pdf/\\$FILE/pr04_review_ofwat_report110805.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pr04_review_ofwat_report110805.pdf/$FILE/pr04_review_ofwat_report110805.pdf).

74 WA 2003 (n 41) s 35.

75 *ibid* s 44; Page, Bakker (n 72).

76 R Mulgan 'Accountability: An Ever-Expanding Concept?' (2000) 78 Public Administration 555–73.

77 *ibid*.

between the institution being held to account and parties holding it accountable, the evaluation of such information being presented and the subsequent praise or blame as a result of the process.⁷⁸ Without information exchanged, there will be no judgment. The function of information is also to make clear to the public the activities of regulators.⁷⁹ In the United Kingdom, there is no general obligation for regulators to publish utilities information but they have the discretion to do so.⁸⁰ In Jakarta, there is no requirement to publish utilities information nor do the regulators have the discretionary power to do so. Accountability of the private sector and the regulator is criticised because of the treatment of information under commercial confidentiality principles.⁸¹

Corruption in the water services sector raises the price of connection by 30 per cent, escalating the cost of achieving Millennium Development Goals for water and sanitation to US\$48 billion.⁸² According to Klitgaard, corruption flourishes when there is monopoly and discretion without transparency and accountability.⁸³ Corruption in the water sector occurs at every stage from policy making and regulation to planning, donor financing, fiscal transfers, management program and design, tendering and procurement, construction, operation and maintenance, including payment for services.⁸⁴ As Klitgaard shows, one way of combating corruption is by imposing a transparency requirement on all stages of water projects.

Regulation also needs to be predictable and credible. Firms need to recoup their investment over a number of years. They need to ensure that the rules of the game do not suddenly change, either in terms of the legal framework or in the way that regulators interpret and implement these rules.⁸⁵ This requires the transparency of potential regulatory changes. The reasoning for regulatory decisions should also be accessible to both firms and consumers in order to establish credibility. *Predictability* of regulation and *credibility* of regulators is therefore a part of the agenda for transparency in water utilities regulation.

To sum up, there is a range of motivations for establishing transparency in water utilities regulation: as a means to increase *allocative efficiency* in the case of water sector liberalisation, as a tool for *benchmarking*, promoting *social objectives*, *participation* and *accountability* mechanisms, tackling *corruption* and establishing *regulatory credibility and predictability*.

5.2 What information should be disclosed?

The motivations for transparency as outlined above raise the question of what sort of information should be available to the public.

Customers' rights

In England, legislation establishes the quality of water deemed to be fit for human consumption, imposes obligations on regulators to enforce service standards and sets out customers' rights to receive compensation due to violations of these standards.⁸⁶ Substandard delivery of water supply includes supply interruptions, lack of pressure or poor water quality. It is a part of the transparency agenda that customers are informed of any right to compensation for violations of these rights. The standard of compensation in England is set out by a statutory instrument⁸⁷ and the summary thereof is published by Ofwat.⁸⁸ In Jakarta, service levels, and penalties for substandard delivery, are regulated in the concession contract. As the detail of the concession contract and its accompanying documents are not available in the public domain, there is a lack of transparency as to whether customers are entitled to receive compensation and – if such a scheme does exist – the amount which they are entitled to claim.⁸⁹

Network expansion plans

In areas without universal coverage, any plan to expand networks is related to the issue of equity. Given resources constraints, utilities need to decide to which regions their coverage should be extended. They can decide to extend into areas with high purchasing power ('cherry-picking') or alternatively, extend networks to areas with lower purchasing power, but with the risk of cross-subsidisation in tariff. This problem can be serious in cities with large social disparities.⁹⁰ There are probabilities that public officials in Jakarta could be involved in rent seeking behaviour by maintaining the status quo⁹¹ of not expanding networks to

78 J D Stewart 'The Role of Information in Public Accountability' in R Hedges (ed) *Governance and the Public Sector* (Edward Elgar Publishing Ltd London 2005) 256–76.

79 C Graham 'Is There a Crisis in Regulatory Accountability?' in R Baldwin, C Scott and C Hood (eds) *A Reader on Regulation* (Oxford University Press New York 1998) 483–522.

80 *ibid.* Ofwat has been well credited for its pioneering efforts in publishing utilities information. Section 201 of the WIA 1991 (n 55) gives authority to the Secretary of State to arrange for publication of information related to water undertaking if it is deemed to be in the public interest.

81 H Kurniasih 'Water Not for All: the Consequences of Water Privatisation in Jakarta, Indonesia' (17th Biennial Conference of the Asian Studies Association of Australia Melbourne 2008) 15.

82 Global Corruption Report (n 31).

83 R E Klitgaard *Controlling Corruption* (University of California Press Berkeley 1988) 75.

84 J Plummer, P Cross 'Tackling Corruption in the Water and Sanitation Sector in Africa' in J E Campos, S Pradhan (eds) *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (World Bank Washington DC 2007) 221.

85 J Stern, S Holder 'Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems. An Application to Infrastructure Industries in the Developing Countries of Asia' (1999) 8 Utilities Policy 33–50.

86 WIA 1991 (n 55) ss 38(2)–(4), 95(2)–(4), 213(2)(d)(e), (2A)(a)–(c), and (2B).

87 The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 SI 2008/594.

88 Ofwat 'Standards of Service' <http://www.ofwat.gov.uk/consumerissues/rightsresponsibilities/standards/>. See also Ofwat 'Rights and Responsibilities' <http://www.ofwat.gov.uk/consumerissues/rightsresponsibilities/>.

89 According to the regulator, the concession contract stipulates that utilities must pay IDR 50.000 (around US\$5.3) per day if supply is interrupted. Director of the PAM Jaya denied that such compensation exists in the contract. See 'Hak Pelanggan Sengaja Disembunyikan (Customer's Rights Are Deliberately Concealed)' Daily Kompas (27 November 2007).

90 In Malawi, geographic information systems (GIS) have been used to map out network expansion to poor areas: Global Corruption Report (n 31).

91 L Lovei, D Whittington 'Rent-Extracting Behavior by Multiple Agents in the Provision of Municipal Water Supply: A Study of Jakarta, Indonesia' (1993) 29 Water Resources Research 1965–74.

slum areas as they are benefited by the high prices⁹² of water sold in public taps.

Network expansion can also mean an increase to existing tariffs as the cost of the extension is spread and inputted into the tariff for a period of time. It also involves trade-offs with service levels.⁹³ Utilities may have to choose either to increase existing service levels by investing in better facilities, or to expand the network but keep the status quo with respect to service levels.

For the above reasons, the public should be informed as to which area the utility plans to expand its network and what implications it will have for the tariff they must pay and the service level they expect.

Non-compliance with service levels and its consequences

A utility's non-compliance towards regulatory standards must be disclosed. This information is vital for investors and creditors as regular non-compliance may have negative effects on a utility's credit rating. The public also needs to be informed of non-compliance issues in order to create pressure on the utilities to take action. Ofwat maintains good practice by publishing penalties it imposes on utilities on its website.⁹⁴ Regulators in Jakarta do not have any statutory power for imposing penalties on the utilities as in England. Penalties are regulated in the contract. Violation of service levels thus becomes a contractual violation which is governed by private law⁹⁵ and, should disputes arise, they are to be settled in courts. The cost of proceedings,⁹⁶ the length of time required to settle

cases,⁹⁷ the threat of going to international arbitration from the concessionaire, all become barriers for the regulator in settling minor consumer disputes in court.

The consequences of non-compliance must be disclosed in order to establish regulatory credibility and ensure that consumers' rights are enforced.⁹⁸ This is also important to establish a perception that sanctions given by regulators are accountable and fair both to the utilities and the public.

Emissions and toxic releases

Levels of energy emissions and carbon footprints are becoming a central issue due to climate change. Water utilities are known for their enormous energy intake. Water utilities also produce wastes that can be hazardous for the environment and human health. Carbon emissions can be subjected to taxations or regulatory actions. Toxic releases and water pollution have implications for land values⁹⁹ and may trigger legal actions from interest groups and environmental regulators. In terms of input of raw water, climate change endangers the supply of bulk water and may increase the cost of delivery and treatment.¹⁰⁰ Energy emissions, carbon footprints and the levels of toxic releases are of interest to investors since they reflect the efficiency levels of a utility.¹⁰¹ Legal actions arising out of pollution may also have implications for costs, which are reflected in tariff structures. Therefore, environmental information is of interest to investors, customers and the local population.

Procurement and utilities accounts

The granting of concession contracts has been problematic in many regions of the world. The procurement for water services following the initial contract award has also been problematic, involving corrupt behaviour,¹⁰² self dealing and transfer pricing between the regulated utility and suppliers.

English water services legislation obligates the utilities to submit 'regulatory' accounts to Ofwat under its licence term.¹⁰³ Ofwat issued a series of regulatory accounting guidelines specifying the format of the information which utilities need to submit. The regulatory accounting guidelines for transfer pricing, for example, require market testing for procurements.¹⁰⁴ The

92 'Pay Up: How the Water Mafia Controls Access' (24 July 2009) <http://thejakartaglobe.com/waterworries/pay-up-how-the-water-mafia-controls-access/319989>.

93 M de Asís et al 'Improving Transparency, Integrity and Accountability in the Water and Sanitation Sector' (World Bank Washington DC 2009) <http://siteresources.worldbank.org/PSGLP/Resources/WaterManualFINALATHENS1106.pdf>.

94 For example 'Notice of Ofwat's Imposition of a Penalty on Thames Water Utilities Limited' (2008) [http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/not_fne_tms_gssfailureimp.pdf/\\$FILE/not_fne_tms_gssfailureimp.pdf](http://www.ofwat.gov.uk/legacy/aptrix/ofwat/publish.nsf/AttachmentsByTitle/not_fne_tms_gssfailureimp.pdf/$FILE/not_fne_tms_gssfailureimp.pdf).

95 In 2009, PAM Jaya enforced the contractual penalty to Aetra, one of the concessionaires, in the sum of around US\$19.3 million for violations of service levels. However, the parties offset the penalty due to PAM Jaya's debt to Aetra for the remaining amount of 'shortfall'. In the Jakarta concession system, PAM Jaya pays Aetra based on the volumetric water sold to consumers multiplied by an indexation formula linked to, among other things, exchange rate and inflation rate (water charge). If the tariff charged to consumers is unable to meet the water charge, PAM Jaya needs to pay the 'shortfall'. In the end, PAM Jaya still owes around US\$25.1 million to Aetra. The penalty resulted in Aetra's bond being listed in Fitch's negative list and PAM Jaya itself receives no cash. What is not clear is whether there are portions of the penalty that should be directly paid to consumers. See 'Denda Di-Offset, Piutang Aetra Ke Pam Jaya Sisa Rp 237 Miliar' (6 March 2009) <http://www.detikfinance.com/read/2009/03/06/184436/1095752/6/denda-di-offset-piutang-aetra-ke-pam-jaya-sisa-rp-237-miliar>.

96 According to Transparency International's Global Corruption Report 2007: 'In Indonesia, around half of users and up to 70 per cent of business people had not used the courts in the previous two years – though they needed to do so – because they perceived them as too corrupt or expensive'. F Sarrica, O Stolpe 'Assisting Judicial Reform: Lessons from UNODC's Experience' in *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press New York 2007) 159–64.

97 The waiting period to adjudication is around 6 to 12 months: *ibid*.

98 Stern, Holder (n 85).

99 For example C Leggett, N Bockstael 'Evidence of the Effects of Water Quality on Residential Land Prices' (2000) 39 *Journal of Environmental Economics and Management* 121–44.

100 J B S John E Cromwell, R S Raucher 'Implications of Climate Change for Urban Water Utilities' (Association of Metropolitan Water Agencies Washington DC 2007).

101 S Konar, M A Cohen 'Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions' (1997) 32 *Journal of Environmental Economics and Management* 109–24.

102 J Davis 'Corruption in Public Service Delivery: Experience from South Asia's Water and Sanitation Sector' (2004) 32 *World Development* 53–71.

103 Condition F of the Appointment Licence. Utilities licences are available at Ofwat's website <http://www.ofwat.gov.uk/industrystructure/licences/>.

104 Ofwat 'Transfer Pricing in the Water Industry, Regulatory Accounting Guideline 5.03' (2002) (Revision) http://www.ofwat.gov.uk/regulating/reporting/gud_rag_5transpric_503.pdf.

licence condition forbids utilities to pay prices to an associated company which exceed those which they have ascertained through market testing, failure to comply with which may entail penalty.¹⁰⁵ These regulatory accounts have to be published. This measure is important to establish accountability of the regulated utilities.¹⁰⁶ Through the publication, consumers can track the inflow and outflow of money by comparing them with the accounts of the utilities' parent and group companies. However, not all of the submissions to Ofwat are available in the public domain since some information which is commercially confidential can be excised. There could also be problems in acquiring information from the unregulated parent companies and other companies in its group. This hinders both regulators and consumers in identifying if transfer pricing has occurred.

In the Jakarta concession model, the concessionaires are given the flexibility for arranging procurements with third parties. There is an obligation in the concession contract to enter into fair, transparent and competitive procurement procedures but this is not detailed any further. There is no set of rules on regulatory accounts or any obligation to publish accounts. This creates difficulties for consumers in detecting the possibilities of transfer pricing.

Tariff setting

Disagreement on tariff levels may have implications for collection rates. Several proposals for increasing tariffs in Jakarta were rejected by the governor, fearing that it would provoke social unrest.¹⁰⁷ There is a need to educate the public on the rationale behind the tariff they are paying as there could be a number of reasons for tariff adjustment, such as conserving water resources, investing in new infrastructure, cross-subsidisation or to comply with environmental quality requirements. However, Hall and Lobina mention the experience of Cochabamba where the financial model is attached to commercial secrecy thereby preventing the tariff components and formula from being disclosed.¹⁰⁸ A similar case occurred in Guinea, where even the authority was not able to assess the price increase proposal from the private utility due to lack of information.¹⁰⁹ Contracts may also contain confidentiality clauses which prevent the regulator from disclosing information to the public without the prior consent of the private operator. This is the case in Fort Beaufort¹¹⁰ and Jakarta.¹¹¹ The component of the

water charge¹¹² is announced by the regulator in Jakarta; however, the detailed cost structure is unknown to the public.

Present and future shareholding

Investors in a concession contract are preferred by governments based on their experience and their financial capacity in managing water supply business. When majority shareholding of a water utility changes, this may raise the question of experience, the financial capability of the new owner and the relationship between the regulated utility and its parent companies under the new shareholding structure. The consumer has an interest that the new parent company will fill managerial positions with capable persons, continue investing in its subsidiary company, ensure that profit from its subsidiary is invested in developing water-only businesses and that the parent company's home jurisdiction is favourable with respect to liabilities arising from human rights violations or corruption conducted by its foreign subsidiary. Nevertheless, the power of governments in controlling takeovers will be limited when the utility is a publicly listed company. Moreover, the regulator does not have any power over parent companies, although it can regulate the utility to 'ring-fence' it from its parent companies.

In England, Ofwat does not have any power to block takeovers and its power does not extend to parent companies of a regulated utility. To minimise the risk caused by change of ownership, it requires the regulated utility to obtain undertakings from its parent company which ensure that it will provide all information necessary to comply with its licence condition, refrain from any action which would cause the utility to breach any of its obligations and maintain three independent non-executive directors with specific capability in the water industry at all times.¹¹³ Failing these requirements, the regulated utilities will be prohibited from engaging in arrangements or contracts with their parent companies.

The Jakarta local government has the power to block acquisition under the concession contract but it has no authority to regulate the utility's corporate structure.¹¹⁴ What it can do is threaten to use contractual power in blocking acquisition if the utility fails to secure certain undertakings from its parent companies.¹¹⁵ This has been done in the past when the government had no clarity on the credibility of prospective buyers due to the use of multi-layered special purpose vehicles (SPVs). The case sparked a debate in the Jakarta local parliament. The Jakarta Governor finally approved the acquisition process after a legal

105 'Ofwat Confirms £8.5 Million Fine for United Utilities Water' P/N 19/07 (22 June 2007) http://www.ofwat.gov.uk/regulating/enforcement/prs_pn1907_nwt_findconf.

106 R Baldwin, M Cave *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press Oxford 1999) 308.

107 K Bakker 'Trickle Down? Private Sector Participation and the Pro-Poor Water Supply Debate in Jakarta, Indonesia' (2007) 38 *Geoforum* 855–68.

108 Lobina, Hall (n 22).

109 *ibid*.

110 '2.2.2: Confidentiality: the documentation contained herein has been developed exclusively by the operator (WSSA) and shall not be disclosed to third parties without the written approval of the operator'; Lobina and Hall (n 22).

111 W Hadipuro, N Ardhianie 'Amandemen Kontrak Konsesi Air Jakarta' (Public Services International 2008).

112 On water charge, see n 95. The formula used on water charge and water tariff is available at JWSRB's website <http://www.jakartawater.org/>.

113 Condition 'P' of the Instrument of Appointment by the Secretary of State for the Environment of Thames Water Utilities Limited as a Water and Sewerage Undertaker under the Water Act 1989 (2005).

114 The approval of the government is only required when the acquisition involves more than 51 per cent of the existing shares. See A Lanti et al *Sepuluh Tahun Kerjasama Pemerintah-Swasta Pada Pelayanan Air Pam Dki Jakarta 1998–2008* (Badan Regulator Air Jakarta Jakarta 2008) 107–9.

115 See N Ardhianie 'Kontroversi Penjualan Pt Thames Pam Jaya (TPJ)' (Amrta Institute for Water Literacy dated 2009, file with author).

opinion clarified the legal relation between the parent companies and its SPVs and several other undertakings related to ring-fencing were secured.¹¹⁶

Every change of ownership must be transparent. The government must inform consumers of the identity of the prospective buyer in order to establish accountability and credibility. Moreover, such measures may help the regulator in assessing the 'track record' of a potential owner.

6 EXEMPTIONS CLAUSES IN FREEDOM OF INFORMATION LAW

When transparency mechanisms are not found in sectoral rules, because contracts are used as the primary instrument for regulation or because sectoral rules simply lack a transparency framework, a transparency agenda could still be forwarded by submitting FoI requests to regulators. However, FoI laws have limitations since they contain clauses which may exempt disclosure requests. This article will compare the exemption clauses in Indonesian and English FoI and evaluate if they can potentially impede the public disclosure of essential information as previously discussed.

Indonesian FoI legislation does not recognise certain types of exemptions. One can interpret this as meaning that all exemptions are subject to a balancing test, but this interpretation is also open to question. In terms of legislative technique, the Indonesian FoI Law locates the balancing test, which consists of the consequences and the 'greater interest' test, in the *principles and objectives* chapter of the Law.¹¹⁷ This *principles and objectives* chapter is a standard chapter in the Indonesian legislative drafting method which enshrines the teleological purpose of the legislation and applies generally to every provision of the Law.¹¹⁸

Unlike its Indonesian counterpart, the English FoI Act specifically regulates the treatment of each exemption by clarifying if the balancing test applies. For some types of exemptions (referred to under the FoI Act as 'absolute exemptions')¹¹⁹ the balancing test does not apply, but in any other case such a test must be applied. There are two types of balancing test under English FoI: those which require the weighing of only public interest and those which require weighing of both the element of harm and a public interest.

Not all exemptions under the English and Indonesian FoIs will be discussed in this article; only exemption clauses deemed to be relevant to water utilities will be elaborated. Graham and Fitch¹²⁰ have discussed four categories of exemption under the original English FoI Act relevant to public utilities in general. These are information relating to enforcement action, information provided in confidence, commercial information and decision-making and policy formulation. In addition, the exemption related to the economy is relevant for inclusion in the comparison due to its strong relation to the transparency agenda in the water utilities regulation.

6.1 Law enforcement and investigations

Regulators are tasked with investigation and enforcement. As previously discussed, such tasks must be carried out with transparency, and decisions or penalties issued to utilities as a result of this must be published. In the case of England, the enforcement powers of Ofwat are laid down under a legislative act¹²¹ and in the case of Jakarta, they are contained in the concession contract. The English FoI Act exempts this information from being disclosed.¹²² The formulation of these exemption clauses is very broad, for example, section 30 covers investigation related to offences or guilt and investigations that may arise in civil proceedings while section 31 covers information related to compliance with the law and improper conduct. There is a public interest test for section 30, and a public interest test and harm test for section 31. Due to these exemptions there is the possibility that some information related to the investigations carried out by the regulator against the breach of a utility's licence conditions is not disclosable under FoI.

The Indonesian FoI Law recognises an exemption on law enforcement.¹²³ However, unlike the English FoI Act, the exemption covers only criminal law enforcement. Furthermore, it is only applicable if a disclosure is deemed to obstruct criminal investigation, reveal the identity of witnesses or informants or endanger the safety of law enforcers. Investigations on civil or administrative matters are not covered in the exemptions. As such, investigations by the regulator on environmental matters or violations of service levels under the concession contract are not covered by this exemption.

6.2 Obligations of confidence and confidentiality clauses

For the purposes of regulation, utilities are required to submit information.¹²⁴ In other cases, regulators may inspect premises owned by utilities companies in order to obtain necessary information. The submissions from utilities are often held on a confidential

116 *ibid.*

117 Indonesian FoI Law (n 44) art 2(4).

118 If the textual meaning of a provision is not clear, the *principles and objectives* chapter may aid interpretation. The benefit of putting the balancing test on this chapter is that it can be interpreted as being applied to all clauses throughout the law (see Indonesia, Law 10 Year 2004 on the Formation of Laws and Regulations Attachment Chapter I). However, it lacks practicalities and poses the danger of being ignored as it gives no strict guidance to the public authority and information commissioner that the balancing test is mandatory. Unless this is clarified in an implementing regulation, there may be confusion as to the status of the balancing test under Indonesian FoI.

119 Section 2 of the English FoI Act (n 36) regulates that exemptions under ss 21, 23, 32, 34, 36 (insofar as it relates to information held by the House of Commons or the House of Lords), 40 (in some cases), 41 and 44 are absolute, which means that no public interest tests are employed.

120 M Fitch, C Graham 'The Draft Freedom of Information Bill – Implications for Utilities' (1999) 10 Utilities Law Review 257–61.

121 WIA 1991 (n 55) ss 18–22.

122 English FoI Act (n 36) s 30 (Investigation and proceedings) and s 31 (Law enforcement).

123 Indonesian FoI Law (n 44) art 17a.

124 Baldwin, Cave (n 106) 308.

basis, which raises the obligation on the part of regulator not to disclose the information to third parties. The duty of confidentiality under English law arises out of equity¹²⁵ and under Indonesian law out of contractual obligation.¹²⁶

Under the English FoI Act, obligation of confidence is an absolute exemption, which means that no balancing test is applied.¹²⁷ Fitch and Graham consider that this exemption gives too much control on the part of utilities. Since the law of confidentiality is highly contextual and flexible,¹²⁸ anything can, in the subjective perspective of the information provider, be regarded as confidential. This can create confusion on the part of the regulator in determining which submissions are legitimate 'commercial in confidence' and which ones are not.

Indonesian FoI contains no exemption for obligation of confidence. Unfortunately, this does not mean that information submission from utilities to water regulators in Jakarta would automatically be disclosable. JWSRB is obligated under its mandate¹²⁹ to maintain secrecy of *all* information and must use information in the regulatory process only for the purpose of mediating potential disputes arising out of the concession. It can be argued however that FoI – which is enacted at the parliamentary level – should derogate JWSRB's mandate (which is a much lower form of regulation). Yet, this interpretation will not overrule the possibility for the concessionaire to launch civil suits against regulators for violating the confidentiality clause under the concession contract.¹³⁰ The relation between FoI and confidentiality clauses in governmental contracts needs to be evaluated in further research.

6.3 Commercial information

Another type of exemption which may prevent regulators from approving disclosure request is 'commercial information'. Under the English FoI Act, trade secrets¹³¹ and commercially sensitive information¹³² are exempted. The Indonesian FoI Law¹³³ exempts all sorts of intellectual property rights (IPR) and information which, if disclosed, undermine the protection against unfair business competition.¹³⁴ The formulation is wide as IPR covers a range of rights from patents, industrial designs and trade secrets to copyright, although arguably some types of IPR such as patent

and copyright already entail publication, which renders their exemptions irrelevant.

The trade secrets exemption may not be so important if perceived from the transparency agenda, as the majority of data submitted to the regulator is rarely traditional technological trade secrets but merely business information which, if disclosed, can benefit competitors. It is interesting to note that the words used under the Indonesian FoI Law exemptions appear to be stricter than the English counterpart. The English FoI Act provides exemption if disclosure '... would or would be likely to, prejudice the commercial interests of any person'¹³⁵ while the Indonesian FoI Law requires that protection from unfair business competition be undermined if exemption is to be granted.¹³⁶ The implications of this will be discussed below.

6.4 Policy formulation

In the English FoI Act, exemptions are given to policy formulation¹³⁷ and disclosures which inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation.¹³⁸ These can potentially exclude deliberations of the regulator's executive board, or advice from advisory committees on disclosure.¹³⁹ However, the English FoI Act provides that statistical information which forms the background of policy making should be disclosed once the decision is taken.¹⁴⁰ It is nevertheless questionable whether this may prevent stakeholders from obtaining information in a timely manner which would allow them to participate effectively in public deliberation, such as that relating to tariff increases. The Indonesian FoI does not provide exemptions for policy formulation.

6.5 Economy

The English FoI Act provides exemption if disclosure would affect the economic or financial interest of the United Kingdom or any of its administration.¹⁴¹ This clause focuses on the impact, requiring that certain harm may potentially occur. Given this formulation, it is unlikely that this clause will have any negative implication on water utilities disclosure. On the other hand, the Indonesian FoI Law¹⁴² focuses on the types of information, by exempting information on foreign investment plans or the purchase and sale of vital state assets or shares.¹⁴³ As discussed above, it is a part of the transparency agenda to publish the shareholding structure of water utilities and any plans to transfer outstanding shares. This economic exemption clause in the Indonesian FoI Law may eventually prevent

125 A Coleman *The Legal Protection of Trade Secrets* (Sweet & Maxwell London 1992) 12.

126 All contracts are legally binding as law on the parties: Indonesian Civil Code art 1338.

127 English FoI Act (n 36) s 41.

128 Fitch, Graham (n 120). The UK's Information Commission guidelines acknowledge the 'flexibility' and contextual nature of the law on confidence in common law: Freedom of Information Act Awareness guidance 2 Information provided in confidence, available at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/confidentialinformation_v4.pdf.

129 Jakarta Governor Regulation 54/2005 (n 52) art 6b.

130 Hadipuro and Ardhianie (n 105).

131 English FoI Act (n 36) s 43.1.

132 *ibid* s 43.2.

133 Indonesian FoI Law (n 44) art 17b.

134 *ibid*.

135 English FoI Act (n 36) s 43.1.

136 Indonesian FoI Law (s 44) art 17b.

137 English FoI Act (n 36) s 35.

138 *ibid* s 36(2).

139 Graham, Fitch (n 120).

140 English FoI Act (n 36) s 35(2).

141 *ibid* s 29.

142 Indonesian FoI Law (n 44) art 17e.

143 The government – somewhat contrary to the Constitution – is encouraging private sector participation through joint ventures and has issued a regulation allowing foreign ownership of water utilities of up to 95%. See Attachment I to the Presidential Regulation of the Republic of Indonesia No. 77 Year 2007 on Negative List of Investment.

the public from knowing the government's plan for privatising water utilities.

7 BALANCING TEST

7.1 Harm test

Any exemption clause in an FoI is drafted for the purpose of protecting a particular (public) interest. The role of the harm test is in examining if the said interest is jeopardised or damaged by the intended disclosure. The risk of harm can be weighed in two ways, namely, (i) its probability of occurring and (ii) its severity. The more likely a risk is to occur, and the more severe its impact on the public interests which are supposed to be protected, the more possibility there is that the exemption is granted.

The English FoI Act does not use the word harm, but utilises the word 'prejudice' instead. The prejudice test is applied through the sections on the Economy, Law Enforcement and Commercial Interest.¹⁴⁴ In terms of its *probability*, the English FoI Act uses the terms 'would, or would be likely to prejudice'. The term 'would be likely to prejudice' allows public authorities to establish a lower threshold than if the term used is 'would prejudice'.¹⁴⁵ As such, proving causality between the *potential* prejudice and the intended disclosure would be adequate, and there is no burden to prove that the prejudice will occur in any case.¹⁴⁶ However, a hypothetical possibility is not allowed; there has to be a real risk of harm. In terms of *severity*, the degree of harm is not established. In order to invoke exemption, the harm does not have to be substantial.

The Indonesian FoI is not clear on the harm test. There are only two general clauses which determine that, as a principle of the Indonesian FoI Law, exemptions shall be based on weighing the *consequences* of the disclosure to the public and whether a *greater interest* can be protected by either retaining the information or disclosing it.¹⁴⁷

7.2 Public interest test

The public interest test in the English FoI Act¹⁴⁸ is applied to the economy, investigations and proceedings, law enforcement, formulation of government policy and commercial interests. In performing the public interest test, public authorities, the Information Commissioner or a higher court will have to weigh the public interest in disclosure against the public interest in keeping the exemption.

Under Indonesian FoI, there is only one public interest clause (the terminology used in the FoI Law is the *greater interest*) which applies generally throughout the law. However, it is to be noted that in Indonesia, the notion of 'public interest' is not well developed in the legal system, although some legislation, notably in the field of criminal law, contains an enforceable (albeit rarely), public interest clause.¹⁴⁹ The reason why doctrines such as public interest are not developing is because the Indonesian legal system is primarily based in codified law, where judges are considered only as an interpreter of rule and shall refrain from making laws.¹⁵⁰

In English law the public interest notion has been steadily developed. The terminology is found in sectoral rules such as the Water Industry Act.¹⁵¹ According to Feintuck, the notion is used to fill the gap which may not be adequately covered by concepts of social regulation, human rights and citizenship.¹⁵² The notion of public interest in a regulatory context provides '... linkage between constitutional values and semi-autonomous legal and regulatory systems' by restraining capital and individualistic values and justifying social regulation. These, according to Feintuck, exist independently from the economic argument of market intervention.¹⁵³

In the practice of English FoI, however, the interpretation of 'public interest' is not only in restraining capital and individualistic values or in justifying a social agenda as discussed previously. Its interpretation encompasses the facilitation of competition, which ranges from protecting fair market competition in public sector contracts (*Welsh Development Agency*),¹⁵⁴ encouraging private sector participation in public procurement (*Her Majesty's Revenue and Customs (HMRC)*)¹⁵⁵ and protecting the competitive advantage of a newly liberalised company (*The Royal Mail*).¹⁵⁶

Although the protection of competition is often cited as a public interest in maintaining the exemption, given the natural monopoly features of water utilities, the extent of protection from disclosure could be a matter of dispute. Robin Simpson¹⁵⁷ argues that there is no justification at all for confidentiality to apply due to the natural monopoly condition of the water sector, while Palast, Oppenheim and MacGregor consider the

144 English FoI Act (n 36), respectively s 29, s 31 and s 43(1).

145 Awareness Guidance No 20 'Prejudice & Adversely Affect', available at http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_prejudice_adversely_affect_version_2.03_14_03_08.pdf.

146 *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 & EA/2005/0030* (17 October 2006).

147 Indonesian FoI Law (n 44) arts 2(4) and 19. The clause is not clear on what is meant by *consequence* and *greater interest* but its elucidation confirms that consequence refers to the interests which are protected under prevailing regulations and greater interest refers to public interest.

148 Sections 29, 30, 31, 35 and 43 respectively.

149 The Indonesian Criminal Code art 14.h grants authority to public prosecutors to drop charges for *public interest* reasons.

150 S Mertokusumo *Mengenal Hukum, Suatu Pengantar* (5th edn Liberty Yogyakarta 2003).

151 WIA 1991 s 201 (n 55). See also, eg, s 195(3), s 14(1) and s 34(3).

152 M Feintuck *The Public Interest in Regulation* (Oxford University Press Oxford 2004).

153 *ibid*.

154 There is '... an inherent public interest in ensuring that companies are able to compete fairly and in ensuring that there is fair competition for public sector contracts'. *Welsh Development Agency Case Reference FS50097376* http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50097376.pdf.

155 *Her Majesty's Revenue and Customs Case Reference FS50157117*. http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50157117.pdf.

156 *The Royal Mail Case Reference FS50126145*. http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50126145.pdf.

157 Simpson (n 2).

case of commercial secrecy in natural monopoly an oxymoron.¹⁵⁸ A Department of Trade and Industry (DTI) Green Paper proposed that information about monopoly business should generally be disclosable, whereas for markets emerging to competition, the extent of disclosure required might be related to the degree to which a company has market power.¹⁵⁹ This is in line with the proposal from the Director General of Telecommunications which suggests that the more market power a player has, the more barriers should be imposed before non-disclosure is allowed.¹⁶⁰ Consumer organisations such as the UK's National Consumer Council¹⁶¹ and Consumers International (CI)¹⁶² argued that burden of proof of secrecy should be placed on the utilities. However, this suggestion failed to be incorporated by the International Standards Organization Technical Committee 224 regarding water and wastewater services.¹⁶³

The relevance of public interest justifications in maintaining exemption clauses in cases involving natural monopoly service is therefore disputed and this problem has not been settled.

Compared with the Indonesian FoI, the case for maintaining an exemption appears to be stronger in the English FoI as it protects *commercial interests* broadly. Water utilities may have commercial interests in certain information which can be used to bid in regions other than those they currently serve. English FoI provides more protection for the utilities by preventing information from being disclosed as it may prejudice their competitive advantage.

On the other hand, the case for disclosure appears to be stronger in the Indonesian FoI. It is not sufficient, under the Indonesian FoI Law, that a party has commercial interest over the information. Protection is granted only if it undermines protection from *unfair business competition*. Elucidation of the Indonesian FoI clarifies¹⁶⁴ that the clause aims at protecting business practices which are dishonest, illegal, or undermine competition. In order to maintain an exemption, parties will need to argue that the information request is illicit, or is somewhat motivated by private interests in exploiting it for commercial gains. As such, for concession contracts as applied in Jakarta for example, a public interest justification in maintaining the exemption is hard to argue. There is a greater interest in disclosing the concession contract and other data to the public as it contains vital information which is a

part of the transparency agenda. How this works in practice remains to be seen now that the FoI has entered into force.

The second reason why English FoI is more favourable to exemption is because of the notion of public interest which has been interpreted in the practice of the FoI Act to encompass the facilitation of competition. This is especially the case in water utilities, in which the regulator now has the primary duty of furthering consumer objectives¹⁶⁵ – where appropriate, by *facilitating competition* – followed by the duty to ensure the carrying out of the functions of water utilities. Conversely, market competition is not emphasised in the Indonesian Constitution and water law. The Indonesian Constitutional Court prefers that, to the greatest extent possible, water utilities should be owned by the state.¹⁶⁶ Therefore, there is a small possibility that the notion of public interest in the Indonesian FoI Law can be broadened so as to encompass the facilitation of competition for and in the water services market.

8 SETTING THE RESEARCH AGENDA

How, then, can the lack of transparency in water utilities regulation be remedied through legal frameworks? This is the question that the author attempts to answer in the ongoing PhD research project. There are several issues which need to be addressed before a recommendation that would lead to the amendment or enactment of laws and regulations can be presented.

The first is the framework for analysing transparency. In the previous sections, transparency is defined almost synonymously with disclosure of information. The author acknowledges that this reduces the meaning of 'transparency'. However, this is necessary to provide a useful analytical tool.

The seven types of information used in the framework are customers' rights, network expansion plans, non-compliance with service levels, emissions, procurement rules and utilities accounts, tariff setting methodology, as well as present and future shareholding. These criteria can still be developed further. Recently, the UN Independent Expert on the right to water issued a 'Good Practices' questionnaire which contains several questions related to transparency and access to information in the context of participation and accountability.¹⁶⁷ In addition, the contemporary development on the right to water and sanitation explore the idea of employing Human Rights Impact Assessment (HRIA) in water services projects involving the private sector, which consists of the elements of

158 Palast (n 34) at 185.

159 DTI 'A Fair Deal for Consumers: Modernising the Framework for Utility Regulation' (March 1998) at Proposal 7.6.

160 Baldwin, Cave (n 106). See also OFCOM 'Review of Utility Regulation: Submission by the Director General of Telecommunications' (September 2007) at para 5.20: 'This approach would accord with the DGT's present policy of greater disclosure where justified by the relevant company's market power or dominance. Publishing such information would help competition to develop as the imbalance in information is reduced and new entrants can take more rational investment decisions.' http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/index.htm.

161 Baldwin, Cave (n 106) 308.

162 Simpson (n 2).

163 *ibid*.

164 Indonesian FoI Law (n 44), elucidation of art 6(3)b.

165 WA 2003 (n 41) s 39.

166 *Judicial Review of the Law No 7 of 2004 on Water Resources* Constitutional Court of the Republic of Indonesia (Judgment of 13 July 2005) No. 058-059-060-063/PUU/II/2004.

167 Office of the High Commissioner for Human Rights 'Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation: Good Practices Related to Access to Safe Drinking Water and Sanitation Questionnaire' (2010) paras 7, 8. http://www2.ohchr.org/english/issues/water/ixexpert/docs/Questionnaire_WatSanGoodPractices.doc.

transparency and access to information.¹⁶⁸ HRIA is an emerging trend in the Business and Human Rights discourse¹⁶⁹ and in sectors other than water it has pinpointed the framework for transparency into disclosure of information.¹⁷⁰ It is likely that HRIA in the water sector will follow the same path.¹⁷¹ These developments will contribute to the refinement of the analytical framework used in this research.

The second issue is identifying the role of different forms of ownership and regulatory models, understanding their impact on transparency and discovering any gaps in the legal framework. There are both theoretical and practical reasons for doing this. The theoretical relevance is in examining the criticism in the literature that private sector participation in water utilities reduces the availability of information.¹⁷² The private sector has contested this and suggests that the opposite is true: participation by the private sector increases the level of transparency.¹⁷³ Both arguments may have some elements of truth. The privatisation critics are correct in pointing out the tendency towards the lack of publicly available information, the weakening of traditional accountability frameworks and the commodification of information. The proponents of privatisation are also correct in inferring that privatisation has, notwithstanding the problems with economic regulation,¹⁷⁴ contributed transparency to the water sector. Regulated water utilities are more likely to have more obligations in justifying their costs to the regulator than an unregulated public utility. It is more appropriate, however, to say that both public and privately owned water utilities face transparency

problems. What differentiates them, probably, are the challenges and the means to tackle them. Opacity in publicly owned water services could be caused by the inadequacy of existing governance frameworks, while in privatised services it may be caused by the inability of institutions to cope with post-privatisation reality.

The practical relevance of comparing public and private modes of ownership for Indonesia is because – for the moment – out of 335 water utilities operating, more than 90 per cent are publicly owned.¹⁷⁵ There are demands for more transparency for these publicly owned PDAMs, either due to corruption allegations¹⁷⁶ or unfair procurements.¹⁷⁷ Moreover, out of the 335 PDAMs, only 94 are financially healthy. The government is interested in bringing more private sector participation through the corporatisation agenda, once the ailing utilities are in a healthy condition.¹⁷⁸ Which corporatisation model is to be followed is not yet clear but, as discussed below, any model will have its own transparency problems.

Along the spectrum of private sector participation itself, there are debates that some models are more opaque than others. Indeed, this article starts by asking the question if it is true that contract-based regulation is less transparent compared to other models, as argued by the literature.¹⁷⁹ In an overview, the English model appears to be more transparent than the Jakarta model. Is this because of the regulatory model or is it simply because, to date, there are no adequate transparency mechanisms in Indonesia? France, for example, also uses contracts as the primary instrument for regulating the private sector; this has led to several cases of abuse and prompted the government to enact laws requiring the local government to publish annual reports about water utilities.¹⁸⁰ So, even when a regulation-by-contract model is used, there could be ways to improve transparency.

There is an emerging discussion toward the extension of general administrative law protection into the private sector. 'Should corporations that are playing quasi-public roles and providing public goods and services be held to the same standards of public transparency and accountability as their public sector brethren?' asked Calland.¹⁸¹ Learning from water privatisations in Bolivia, Johannesburg and elsewhere, he argued that it should.¹⁸² In England, after a public consultation, the government expressed its interest in expanding the application of English FoI directly to

168 'Some of the key aspects of taking a rights-based approach to access to water and issues related to access to sanitation include: ... Empowering affected individuals and communities by respecting their right to seek, receive, and impart information, and participation in planning and decision-making.' See CEO Water Mandate 'Water and Human Rights: Exploring the Roles and Responsibilities of Business' (Discussion Paper written by S Tripathi and I Morrison Pacific Institute and Institute for Human Rights and Business 2009), available at http://www.unglobalcompact.org/docs/issues_doc/Environment/ceo_water_mandate/Business_Water_and_Human_Rights_Discussion_Paper.pdf at 6. See also pp 1, 5 and 7.

169 'Human Rights and Transnational Corporations and Other Business Enterprises' UN Commission on Human Rights Res 2005/69 UN Doc E/CN.4/2005/L.87 (15 April 2005) para 1. See also J Ruggie 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819–40.

170 P Hunt, G MacNaughton 'Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health' (Health and Human Rights Working Paper Series 6 Submitted to UNESCO 31 May 2006) http://www.who.int/hhr/Series_6_Impact%20Assessments_Hunt_MacNaughton1.pdf.

171 See n 168.

172 See nn 20, 21 and 22.

173 According to Gerard Payen: 'Indeed, these partnerships involve detailed contracts, public information and regular reporting which bring intrinsic transparency to the actions in the field of private operators mandated by governments. This transparency means that while private companies mandated by governments serve less than 4% of the population of developing countries it is where they intervene that the problems of the water sector in developing countries are the best known and the most studied by academics'. See 'UN Human Rights Council Public Hearing by the Independent Expert on the Right to Water Introductory Remarks by Gerard Payen' (AquaFed 2010), available at http://www.aquafed.org/pdf/RTWSGeneva_CDA_Public_Hearing_GPspeech_finalb_Pc_2010-01-27.pdf.

174 See nn 24–30.

175 'Investasi Air Minum Menunggu Pdam Sehat' Indonesian Ministry of Public Works (28 August 2008) http://ciptakarya.pu.go.id/index.php?option=com_content&task=view&id=779.

176 For example, see 'Mewaspadai Korupsi Di Sektor Air' *Transparansi Internasional Indonesia* (26 June 2008) <http://www.ti.or.id/press/91/tahun/2008/bulan/06/tanggal/26/id/3104/>.

177 See 'Pdam Surabaya Didemo Puluhan Orang' *Okzone* (13 November 2007) <http://news.okezone.com/read/2007/11/13/1/60447/pdam-surabaya-didemo-puluhan-orang>.

178 Note 175.

179 Note 2.

180 NERA Economic Consulting (n 2) 18.

181 R Calland 'Transparency in a Profit Making World' *Institute for Policy Dialogue* (2006) http://www0.gsb.columbia.edu/ipd/pub/Calland_Private_Sector.pdf.

182 *ibid*.

public utilities, including water utilities,¹⁸³ despite the current disclosure practices made through regulatory bodies.

After the implication of different ownership and regulatory models towards transparency is understood, the third agenda will be formulating the legal framework for transparency mechanisms. There are several approaches to using legal frameworks to tackle transparency problems. The first, used in England,¹⁸⁴ is to empower the regulator with the authority to publish information about utilities which they deem to be in the public interest to be published. However, the list of information that needs to be published is not detailed in the legislation as it is a part of regulatory discretion. Secondly, there is a suggestion that the legal framework explicitly clarifies which information can be legitimately expected by stakeholders and which information can be treated as confidential.¹⁸⁵ This requires that the types of information are defined in the legislation.

The first approach is more flexible and enables the regulator to decide on a case by case basis which information can be deemed confidential and which is not. However, this does not create direct rights to stakeholders to claim for disclosure of information. Moreover, regulators need guidelines on which information is in the 'public interest' to be published. As discussed above, the interpretation of this term can be vague in countries such as Indonesia.¹⁸⁶ This can also raise the question of accountability of the regulator's decision not to publish certain information. The second approach creates certainty as to the types of information that should be published and generates direct rights to stakeholders. Nevertheless, it is less flexible compared to the first. There could also be a problem with respect to the level of legislation and the detail of information that should be published. It is not adequate to suggest that utilities need to publish their accounts for example, as the components of the accounts needs to be detailed. The problem is that setting very detailed rules at the higher level of legislation may even jeopardise regulation, as the need to rapidly change the elements of regulatory accounts may supersede the capacity of the legislators in enacting and modifying rules. Therefore, even when the second approach is used, there may be a need to apportion some part of the disclosure mechanism to the regulator as one cannot expect legislation to deal with every detail. Hence, one would also expect some elements of discretion in practice, albeit narrower than with the first approach.

183 Freedom of Information Act 2000: Designation of Additional Public Authorities Response to Consultation CP(R) 27/07 (16 July 2009). See points 11 and 12 '... the Government is attracted to bringing such utilities within the Act. While it does not propose to include utilities in the first section 5 order, it will carry out further consultation with the bodies concerned to assess whether it would be appropriate to include some or all of them in a subsequent section 5 order, or to extend the scope of the Act to cover them in an alternative way'. Available at http://www.justice.gov.uk/consultations/docs/consultation-response_section5.pdf, see also n 39.

184 Notes 55, 80.

185 NERA Economic Consulting (n 2) 64.

186 See the discussion on public interest test above and nn 148–52.

Next, there is a need to settle the issue as to which sort of legal framework should be used to embody the transparency mechanism: national-level sectoral rule, general administrative law or regional by-laws? As explained previously, Indonesia, as yet, does not have any water services law.¹⁸⁷ There is a limited scope for regulating at the national level as water service is a part of powers which are delegated by the central government to municipal and provincial governments due to regional autonomy.¹⁸⁸ At the same time, in Indonesia, there is a growing tendency to provide non-judicial remedies to citizens under general administrative law, for example, through the Public Services Law¹⁸⁹ and the FoI Law which are enacted at the national level but have bureaucracies downward to regional level. These laws provide transparency mechanisms on governmental public services or (to a certain extent) when private sector participation is selected as a mode of delivery.¹⁹⁰ The Indonesian Public Service Law mandates the regional Ombudsman Commission for enforcement mechanisms and the Indonesian FoI empowers regional Information Commissions¹⁹¹ for its enforcement. These regional commissions deal with public services in general, not only water services; as such, they have no specific capacity in understanding the nature of water utilities regulation. Given this broad task, would it be reliable to entrust the enforcement of transparency mechanisms in the water utilities regulation to them? To what extent can this general administrative protection framework which is enacted at the national level be reconciled with regional autonomy? These questions need to be explored more fully than is possible in this article, before recommendations can be made.

9 CONCLUSIONS

Transparency in the water sector is motivated by a variety of reasons ranging from the increasing of allocative efficiency in the case of water sector liberalisation, benchmarking, promoting social objectives, enabling participation and accountability mechanisms, tackling corruption and establishing regulatory credibility and predictability. In order to realise these purposes, information on customers' rights, network expansion plans, non-compliance with service levels, emissions, procurement rules and utilities accounts, tariff setting methodology, as well as present and future shareholding must be readily available at any time.

In England and Wales, sectoral rules, licence conditions and regulatory decisions provide a disclosure framework for the majority of such information. In Jakarta, much of this information is embodied in private contracts. Where the regulatory framework does not provide a disclosure mechanism, FoI can play an important role. This is especially the case where contracts – instead of an independent regulatory body mandated by legislation – are used as the primary

187 Notes 53, 58.

188 Article 40 c of Law 7/2004 (n 58) and art 40 of GR 16/2005 (n 53).

189 Indonesia, Law 25 Year 2009 on Public Services.

190 *ibid* arts 13, 14, 18. On FoI, see n 44.

191 See the discussion on FoI in England and Indonesia above.

instrument for regulation. However, there is an underlying problem that disclosure of information under FoI rules may cause regulators to face legal actions for violating confidentiality clauses in the water concession contract.

The role of FoI in advancing the transparency agenda in the water sector is also limited by its exemption clauses. The central issue in this respect is whether the consideration for maintaining exemption due to public

interest reasons for market competition is relevant given the natural monopolistic character of the water sector. There is general agreement among regulators and academics that the rise in market power means that exemption for utilities from disclosure should not be granted lightly. How this would operate in practice, however, is still not clear. More research is required to reveal the relation between market power and disclosure, and the methodology in balancing the public interests in such cases.