



Mr John Jackson
C/O Mark Mills
Office of the General Counsel
OFGEM
10 South Colonnade
Canary Wharf
London, E14 4PU

By post and email: john.jackson@ofgem.gov.uk

30 November 2018

Dear Sir

Re: The Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme
Provision of a Section 21 Notice requiring the provision of evidence in the form of a written statement

I am writing to you in my capacity as Solicitor to the Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme (known as 'the RHI Inquiry') which has been set up under the Inquiries Act 2005 ('the Act').

You will be aware that the RHI Inquiry is conducting its investigations into the matters set out in its Terms of Reference, available on the Inquiry's website. The Inquiry is continuing with the process of gathering all of the relevant documentation from relevant departments, organisations and individuals.

In addition, the Inquiry is also engaged in the process of requiring individuals who have been, or who may have been, involved in the range of matters which come within the Inquiry's Terms of Reference to provide written evidence to the Inquiry Panel.

In keeping with the approach we are taking with other individuals, the RHI Inquiry is now issuing to you a Statutory Notice (known as a 'Section 21 Notice') pursuant to its powers to compel the provision of evidence in the form of a written statement in relation to the matters falling within its Terms of Reference.

The Section 21 Notice enclosed with this letter requires you to provide evidence to the RHI Inquiry Panel in the form of a written statement addressing the matters identified in the Schedule to the Section 21 Notice. As the text of the Section 21 Notice explains, you are required by law to comply with it.

The aim of the enclosed Notice is to require you to provide all relevant evidence you have within your knowledge, information or belief which is pertinent to the Inquiry's Terms of Reference. The Schedule to the enclosed Section 21 Notice provides further detail as to the matters which should be covered in the written evidence which is required from you. In the event that there is a category of information in respect of which you have no evidence which you can provide, please state this in your response. Where you can provide evidence, the more comprehensive your statement is, the less likely it may be that the Inquiry will have to revert to you at a later stage for clarification, although in many cases this is likely to be necessary to some degree.

It is vital that the witness statement you provide to the Inquiry is your own evidence, absent the influence of others; that it is comprehensive; and that it fully explains your involvement in the matters about which you have been asked.

As you may be aware, the Inquiry has already required the provision of a statement setting out the corporate position of Ofgem in relation to the Northern Ireland RHI Scheme. However, the Inquiry Panel is also interested in the roles played by

individual officials from Ofgem who were involved with the Scheme. Moreover, the Inquiry Panel recognise that individual officials may have a different perspective from, or may even disagree with certain aspects of, the position adopted by the organisation they work for. The statement, which is required from you pursuant to the enclosed Notice, is your opportunity to explain what you did in relation to the Northern Ireland RHI Scheme and why you did it; and also to make the Inquiry aware of any concerns you may have about the actions of others.

I appreciate that you may require or desire access to some documentation in order to assist you in preparing your statement. In particular, you may wish to see documentation to which you previously had access but now no longer have access in your current post. If that applies in your case, I understand that Ofgem will assist you, at least in the first instance. You should contact Mark Mills, Principal Legal Advisor at Ofgem. He is contactable at Mark.Mills@ofgem.gov.uk. I have informed Mark Mills that you may be making contact with him to arrange access to documentation, or for general assistance and support; but there is, of course, no obligation upon you to do so. If you encounter any difficulties, of whatever kind, you should not hesitate to get in touch with me.

I also refer you to Restriction Order No 2 made by the Chairman of the RHI Inquiry on 22 June 2017, a copy of which is enclosed for your convenience. This restriction order prohibits you from publishing any documentation received from the RHI Inquiry (save that you may show it to your legal representative) unless you first obtain the consent in writing of the Inquiry Chairman.

In addition to the four restriction orders made by the Chairman of the RHI Inquiry (which you will find published on the Inquiry website) receipt of this correspondence and its enclosures also places you under a duty of confidentiality to the RHI Inquiry in respect of them. You may share the correspondence and the enclosed Notice and documents with your legal representative(s), but neither you nor they may show, communicate the contents of, nor provide this correspondence or the Notice or documents to any other person or organisation without the express permission of the RHI Inquiry. Any breach of this duty of confidentiality is actionable at the suit of the Inquiry Chairman.

You will also find attached to the Section 21 Notice a Guidance Note explaining the nature of a Section 21 Notice and the procedures that the RHI Inquiry has adopted in relation to such a notice. In particular, you are asked to provide your evidence in the form of the template witness statement which is also enclosed with this correspondence.

Given the tight time-frame within which the RHI Inquiry must operate, the Chairman of the Inquiry would be grateful if you would comply with the requirements of the Section 21 Notice as soon as possible and, in any event, by the date set out for compliance in the Notice itself.

Finally, I would be grateful if you could acknowledge receipt of this correspondence and the enclosed notice by email to Patrick.Butler@rhiinquiry.org.

Please do not hesitate to contact me to discuss any matter arising.

Yours faithfully

A handwritten signature in black ink that reads "Patrick Butler". The signature is written in a cursive style with a long horizontal stroke at the end of the name.

Patrick Butler

Solicitor to the RHI Inquiry

02890408928

SCHEDULE
[No 243 of 2018]

Background

1. Set out a description of your occupational history, qualifications and experience.
2. Set out a summary of your role or roles within Ofgem. Please provide details of dates between which you held the role/s, and what the role/s entailed. In each instance, describe how this role related, if at all, to the Non Domestic Renewable Heat Incentive (RHI) Scheme in Northern Ireland ('the NI RHI Scheme').
3. Explain, insofar as is relevant to any involvement you had with the RHI Scheme, to whom you were accountable and/or reported in Ofgem and who, if anyone, was accountable and/or reported to you.

Involvement with Northern Ireland RHI Scheme

4. Please summarise any involvement you had with the NI RHI Scheme, whether in respect of its creation, operation, administration, or otherwise, specifying in each case details of the period/s In which you were so involved.
5. In respect of your particular role or position:
 - a. Explain what proportion or percentage of your role was devoted to work on the NI RHI Scheme (giving details, if applicable, of how this altered over time or at different periods);
 - b. Explain how you carried out your roles or responsibilities in relation to the NI RHI Scheme on a day-to-day basis; and

- c. Specify whether you consider you were adequately trained and/or resourced in respect of your roles or responsibilities in relation to the NI RHI Scheme. (If not, please specify clearly in what respects you contend this was not so and, if applicable, what steps you took in relation to this).

Brimstone investigation and release of information to the PSNI – Emails between John Jackson and Samantha Turnbull October-November 2016

On 26 October 2016 at 08.43 (OFG-210239), the PSNI sent Ofgem a “Request for Disclosure of Personal Data” on PSNI Form 81 (OFG 44935 to OFG-44936). The request was made under the Data Protection Act 1998 (DPA) Section 29(3) Crime Exemption (the prevention or detection of crime and/or the apprehension or prosecution of offenders).

The request related to Stephen Brimstone and specifically asked “*whether or not the named individual has made any applications in relation to the RHI scheme and if so what the particulars of these applications are*”. The request also stated that the information was required for an “*RHI Fraud allegation*”.

Ms Turnbull forwarded the request to you on 26 October 2016 at 08:51 (OFG-210238). Ms Turnbull advised that, in addition to the application, Ofgem also held an audit report and the Ofgem RHI Compliance team’s assessment of the audit report, which included subsequent evidence. Ms Turnbull asked if “*you could confirm you’re happy for us to release this info?*”

You provided a reply on 27 October 2016 at 16:15 (OFG-210236 to OFG-210237). In summary, you advised that the information should be disclosed as the release was consistent with the requirements of the DPA (OFG-210237 para.6).

Ms Turnbull replied on 27 October 2016 at 16:22 (OFG-210236), asking if Ofgem can release the application, the audit report and the Ofgem RHI Compliance team’s assessment “*as the DPA request only requests the application but obviously it wouldn’t seem right to withhold 2) and 3)*”.

You replied on 27 October 2016 at 17:19 (**OFG-210235**). In summary, you state that although it might not seem right to withhold the report and the assessment, to furnish the audit report would go beyond the scope of the request. You then ask Ms Turnbull to forward the Ofgem RHI Compliance team's assessment, its conclusions and the subsequent evidence which was requested, including how and when it was requested.

Ms Turnbull replied on 28 October 2016 at 09:06 (**OFG-210235**). She stated that the PSNI were keen to understand if Ofgem had done any investigations, to prevent the duplication of work, *"so I think the audit report and subsequent documents will be critical to them"*.

You replied on 28 October 2016 at 10:38 (**OFG-210235**). You stated that all you needed to review were the assessment and the subsequent request for evidence. You further stated that you didn't need to review the audit report.

You provided further advice on 28 October 2016 at 15:53 (**OFG 210233 to OFG-210234**). In summary, you stated that there did not appear to be anything from the audit report or from Ofgem's exchanges with Mr. Brimstone to suggest that he was engaged in fraudulent activity. You ask Ms Turnbull if she is able to shed any light on why the PSNI are investigating Mr. Brimstone for fraud. In conclusion, you state that the audit report and correspondence should only be disclosed on foot of a formal request from the PSNI. Accordingly, all that was required was to furnish the PSNI with the relevant application.

Ms Turnbull emailed you on 31 October 2016 at 09:12 (**OFG-210233**) asking if it would be possible to make reference to "further work" that Ofgem had conducted to prompt the police to send a further information request.

You replied at 10:54 on the same date (**OFG 210232 to OFG-210233**). You asked Ms Turnbull: *"what is in the audit report that you feel would add value to the PSNI investigation"*, and *"the reason(s)...why the PSNI are investigating Stephen Brimstone for fraud"*. You state, in paragraph three, that Ofgem should only assist the PSNI with their investigation *"if we are convinced that they have good reasons to be investigating him"* (**OFG-210233**). You state in paragraph four, that you would be reticent about

prompting the PSNI to request to see the audit report and that their original request "could be viewed as being speculative".

Ms Turnbull emailed you on 31 October 2016 at 11:00 (OFG-210232) stating that the police appeared to have received the same anonymous letter that sparked Ofgem's investigation and audit. The reason for wanting to share the report was to avoid duplication of work and to let the PSNI know that Ofgem had investigated the allegation and did not consider there to be cause for concern.

You replied on 31 October 2016 at 12:03 [OFG-210231] that you still felt that Ofgem shouldn't share the audit report unless the PSNI ask for it. Ofgem could confirm that they had completed an investigation and that *"it concluded there isn't any cause for concern"*. You conclude by advising that Ofgem should just send a copy of the application

On 31 October 2016 at 12:14 (OFG-128558), Ms Turnbull emailed the PSNI forwarding the application and advising the police that Ofgem's investigation concluded that there was no cause for concern.

The PSNI officer replied on 1 November 2016 at 14:35 (OFG-128558) stating that having considered the application, she agreed that there was no cause for concern.

Ms Turnbull forwarded this email to you on 3 November 2016 at 10:07 (OFG-210241). You replied at 10.13 on the same date. You stated that you agreed that this concluded the matter.

On 1 November 2016, Ofgem received from the PSNI a further PSNI Form 81 Request for Disclosure of Personal Data requiring "results/evidence of the audit conducted into [Stephen Brimstone's] non-domestic status" [OFG-128555].

You are also referred to the Inquiry witness statement of Samantha Turnbull at **WIT-284716 to WIT-284738**.

6. As to this sequence of events:

- a. At the time of these exchanges was the culture within Ofgem not one of complete openness and transparency with police fraud investigations? Please explain your answer.
- b. Why did you not have Ms. Turnbull inform the police of exactly what material Ofgem held, and (on the basis of your concern about the scope of the DPA request) indicate that to provide that material Ofgem required an appropriately wide request?
- c. Given Ms. Turnbull appears to have wanted to provide documents she considered relevant to the investigation the police were conducting (indeed, she described them as "*critical*"), why was it not part of your role to provide advice that would put Ms. Turnbull into a position where she could provide the material she considered the police should receive?
- d. You informed Ms. Turnbull that Ofgem should only assist the PSNI with its investigation "*if we are convinced that they have good reasons to be investigating him*". When and how did it become part of Ofgem's role to assess and satisfy itself about the veracity of a police fraud investigation before being prepared to provide documentation?
- e. If the police were conducting a fraud investigation into an RHI application, and said so to Ofgem, on what basis could Ofgem consider that the police request for information could be viewed as "*speculative*"?
- f. Were the steps that you took, and the advice that you gave, overseen by your line managers in the Ofgem Legal Department? If so, did they concur with the approach you were taking?

- g. Do you accept that the appropriate response from Ofgem to the request for information from police carrying out a fraud investigation involving the use of public funds, is to inform the police of the material Ofgem holds relevant to that investigation, and then ensure Ofgem obtains a request wide enough to provide the police with that material?

On 25 May 2017 Deloitte produced a report, requested by the Ofgem Chief Operating Officer, *“to provide an independent examination of the facts relating to concerns raised over a particular participant's entitlement to claim under the Scheme and undertake further enquiries as is considered necessary, documenting the results of these procedures”*. The report addressed the question of engagement with the PSNI. (OFG 200494 to OFG-200516).

7. As to this:

- a. Did you have the opportunity to contribute to the process leading to the report? Please explain your answer.
- b. The report notes that your line manager (Michael Knight) was copied on all email correspondence in which your advice was provided, including the decision to conclude the matter (OFG-200512). What was Michael Knight's input into the advice you provided?
- c. If there is anything else you want to say to the Inquiry about the report, or its findings, please set it out here.

8. Do you consider that Ofgem's approach to the disclosure of information to the PSNI in the Brimstone case was reflective of a general culture within the Ofgem in relation to information-sharing, whether with the police or others? Please explain your answer.

General

9. Considering the RHI Inquiry's Terms of Reference, please identify any representations made to you about the RHI Scheme (which you regard as significant and about which you consider the RHI Inquiry should be aware), whether those representations were made by colleagues, or otherwise. In respect of any such representations please indicate when they occurred, where they occurred, who was involved, and what was said or communicated to you.

10. Considering the RHI Inquiry's Terms of Reference, please identify any conversations or discussions you had about the RHI Scheme (which you regard as significant and about which you consider the RHI Inquiry should be aware), whether those conversations or discussions involved colleagues, or otherwise. In respect of any such conversations or discussions please indicate when they occurred, where they occurred, who was involved, and what was said to you.

11. Provide any further evidence within your knowledge or belief which is relevant to the matters which the RHI Inquiry is investigating as set out in the RHI Inquiry's Terms of Reference.

NOTE:

It is important for the efficiency of the RHI Inquiry that the issues identified above are addressed as fully as possible and by reference, where available, to the dates and locations of specific incidents to which reference is made. The statement should be broken down into paragraphs, which should be numbered sequentially from '1' to the end. The use of appropriate section headings or sub-headings is also encouraged. A template witness statement is provided with this Notice for your assistance and should be used as the format for your response.



INQUIRY INTO THE RENEWABLE HEAT INCENTIVE SCHEME

RHI REF: Notice 243 of 2018

DATE: 6 December 2018

Witness Statement of: John Jackson

I, John Jackson will say as follows:

Introduction

I am providing this witness statement to the inquiry into the Renewable Heat Incentive (the `inquiry`) in response to a Statutory Notice issued in accordance with section 21 of the Inquiries Act 2005 dated 30 November 2018 (Notice 243 of 2018) (the `Notice`).

In preparing my witness statement, I have considered the specific documents referred to in the Notice. It has not been possible to reference every single document which I would have seen within the relevant period. Accordingly, with the exception of the specific documents I have reviewed during the preparation of my statement, I am reliant on my recollection of events which took place during the relevant period.

Background

1. **Set out a description of your occupational history, qualifications and experience.**

**Apr 2013 – To the present Ofgem
Senior Legal Advisor**

See answer to question 2 below.



December 2012 – March 2013 Department of Work and Pensions

Locum Advisory Lawyer

Prepared Transfer Schemes and Transfer Orders, for the transfer of staff and property to new bodies, following the abolition of Primary Care Trusts and Strategic Health Authorities, under the Health and Social Care Act 2012.

Provided general advice on the Health and Social Care Act 2012, in relation to the abolition of Primary Care Trusts and Strategic Health Authorities.

May 2012 – August 2012

The Law Society

Locum Public Lawyer

Provided advice and assistance on a diverse range of legal issues including regulatory and compliance, human right, contract law, insurance law, fraud, Law Society interventions, applications from solicitors for assistance in legal proceedings, and judicial reviews.

December 2009 – April 2012

Transport for London

Senior Associate - Public and Regulatory Law

Provided advice, guidance and practical assistance on legal statutes affecting TfL and the GLA, and on a wide range of other public and local government statutes, associated regulations and standing orders.

January 2008 – December 2009

Greater London Authority

Interim Group Leader – Public Law

Provided advice, guidance and practical assistance on legal statutes affecting the GLA and TfL and on a wide range of other public and local government statutes, leading on all matters of Public Law.

November 2001 – January 2008

Greater London Authority

Senior Legal Advisor – Public Law

Provided advice, guidance and practical assistance on legal statutes affecting the GLA and TfL and on a wide range of other public and local government statutes.



April 2000 – November 2001

London Borough of Lewisham

Civil and Criminal Litigation Lawyer

Managed a varied caseload involving all aspects of criminal litigation; Advised officers on investigative procedure and court actions, under the Criminal Procedure and Investigations Act 1996, and the Police and Criminal Evidence Act 1984; Instructed and managed external Counsel; Prepared various documents and correspondence for the conduct of criminal litigation, including summonses, information's, witness statements and various court forms; Issued various court applications in the Magistrates' Court and the County Court; Appeared on behalf of the Council as an advocate before the Magistrates' Court and the County Court; Introduced new procedures arising from new legislation as required and preparing any necessary documentation

March 1999 – April 2000

London Borough of Newham

Assistant Solicitor – Landlord and Tenant Law

Supervised the work of senior law clerks and legal assistants; Conducted legal proceedings arising from the Council's statutory powers and duties in relation to; the Housing Act 1985, the Landlord and Tenant Act 1985, the Defective Premises Act 1974, the Housing (Homeless Persons) Act 1977, anti-social behaviour orders; gas safety injunctions, Protection from Eviction Act 1977; Prepared, issued and served notices, orders and other legal documentation in relation to court processes pursuant to the Council's statutory duties and powers under various legislation.

October 1998 – February 1999 Sandwell Metropolitan Borough Council

Assistant Solicitor – Employment Law

Advised the Council and the West Midlands Fire and Civil Defence Authority on matters of employment law affecting employee relations; Conducted a varied caseload involving all aspects of Employment litigation.

**February 1996 – March 1998****London Borough of Southwark****Trainee Solicitor**

Seat rotation: Litigation/Planning/Property and Conveyancing/Employment

July 1992 – February 1996**London Borough of Southwark****Principal Legal Assistant - Civil Litigation**

Conducted a varied and complex caseload involving all aspects of civil and criminal litigation; Conducted a varied caseload involving all aspects of landlord and tenant litigation

March 1991 – July 1992**London Borough of Southwark****Legal Assistant – Civil Litigation**

Conducted a varied caseload involving all aspects of landlord and tenant litigation, including possession proceedings, rent arrears and disrepair.

Education

- University College London, 1993 – 1995 (Part-time)
- University College London, 1987 – 1988
- College of Law, 1986 – 1987
- Polytechnic of the South Bank 1983 – 1986

Qualifications

- Admitted as a Solicitor to the Supreme Court of England and Wales, May 1998
- University College London: Post Graduate Certificate in Law, Pass, September 1995
- University College London: Master of Laws - LLM, September 1988
- Polytechnic of the South Bank: Bachelor of Laws – LLB Hons, June 1986

2. **Set out a summary of your role or roles within Ofgem. Please provide details of dates between which you held the role/s, and what the role/s entailed. In each instance, describe how this role related, if at all, to the Non Domestic Renewable Heat Incentive (RHI) Scheme in Northern Ireland ('the NI RHI Scheme').**

Between April 2013 and October 2016, I occupied the role of Senior Legal Advisor within Ofgem, where I provided advice on various Environmental Programmes including under the Renewables Obligation Order 2009 (as amended), the Renewables Obligation (Scotland) Order 2009 (as amended), the Renewables Obligation Order Northern Ireland) 2009 (as amended), the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) Regulations 2003, Climate Change Levy (General) Regulations 2001, the various Non-Fossil Fuel Orders for England and Wales, the various Non-Fossil Fuel Orders for Scotland.

On 4 October 2016, I ceased working on the aforementioned Environmental Programmes, having transferred on that date from the Renewable Energy Legal team to the Renewable Heat Incentive Legal team. Since joining the Renewable Heat Incentive Legal team I have provided advice across the Renewables Heat Incentive Schemes, primarily in relation to the Non-Domestic Renewables Heat Incentive Scheme, but also in relation to the Domestic Renewables Heat Incentive Scheme. This is the role that I continue to occupy.

3. **Explain, insofar as is relevant to any involvement you had with the RHI Scheme, to whom were you accountable and/or reported in Ofgem and who, if anyone, was accountable and/or reported to you.**

Insofar as it is relevant to any involvement I have had with the RHI Scheme, I was accountable to and reported to Michael Knight in Ofgem. Michael Knight was, and continues to be my line manager. Insofar as it is relevant to any involvement I have had with the RHI Scheme, nobody was accountable to or reported to me.

Involvement with Northern Ireland RHI Scheme

4. **Please summarise any involvement you had with the NI RHI Scheme, whether in respect of its creation, operation, administration, or otherwise, specifying in each case details of the period/s in which you were so involved.**

The involvement I have had with the NI RHI Scheme, whether in respect of its creation, operation, administration, or otherwise, is limited to the provision of legal advice only. I have, since 4 October 2016, and continue to provide legal advice on RHI related matters.

5. **In respect of your particular role or position:**
- a. **Explain what proportion or percentage of your role was devoted to work on the NI RHI Scheme (giving details, if applicable, of how this altered over time or at different periods);**

In respect of my present role as a Senior Legal Advisor, since 4 October 2016, I have advised almost exclusively on RHI or RHI related matters in respect of both the schemes in Great Britain, and Northern Ireland. It is fair to say that although it is variable, RHI or RHI related matters in respect of Northern Ireland occupied approximately 15 to 20% of my time.

- b. **Explain how you carried out your roles or responsibilities in relation to the NI RHI Scheme on a day-to-day basis; and**

I have carried out my role or responsibilities, in relation to the NI RHI Scheme, on a day-to-day basis, by the receipt of instructions from my policy colleagues. My instructions were presented to me either by a direct email, or in the form of a more formal Request for Legal Advice (an "RLA"). Following the receipt of an email requesting legal advice, or



a formal RLA, my task would often involve me providing advice on the interpretation of the Renewable Heat Incentive Scheme Regulations 2012, and other statutes, such as for example the Utilities Act 2000, and the Data Protection Act 1998, which were applicable to Ofgem. I am supervised by my line manager, Michael Knight in the performance of my duties. Michael will make himself available to discuss any aspect of the role that I perform, and we usually have a formal discussion about my performance at least once a month.

- c. Specify whether you consider you were adequately trained and/or resourced in respect of your roles or responsibilities in relation to the NI RHI Scheme. (If not, please specify clearly in what respects you contend this was not so and, if applicable, what steps you took in relation to this).**

Although I had not received any specific training, to prepare me for my role or responsibilities in relation to the NI RHI Scheme, I do consider that I was adequately trained to perform in that role, as I had spent the previous three years and a half years advising on a similar scheme in relation to the Renewables Obligation Order 2011. Further, given that there were other lawyers available to provide advice in relation to the NI RHI Scheme, I do not consider that I or we were under resourced.

Brimstone investigation and release of information to the PSNI – Emails between John Jackson and Samantha~Turnball October-November 2016

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Ms Turnbull forwarded the request to you on 26 October 2016 at 08:51 (**OFG-210238**). Ms Turnbull advised that, in addition to the application, Ofgem also held an audit report and the Ofgem RHI Compliance team’s assessment of the audit report, which included subsequent evidence. Ms Turnbull asked if *“you could confirm you’re happy for us to release this info?”*

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Ms Turnbull forwarded this email to you on 3 November 2016 at 10:07 (**OFG-210241**). You replied at 10.13 on the same date. You stated that you agreed that this concluded the matter.

On 1 November 2016, Ofgem received from the PSNI a further PSNI Form 81 Request for Disclosure of Personal Data requiring "results/evidence of the audit conducted into [Stephen Brimstone's] non-domestic status" [**OFG-128555**].

You are also referred to the Inquiry witness statement of Samantha Turnbull at **WIT-284716 to WIT-284738**.

6. As to this sequence of events:

- a. At the time of these exchanges was the culture within Ofgem not one of complete openness and transparency with police fraud investigations? Please explain your answer.**

No. By the time that these exchanges took place, I had already dealt with a number of similar requests for information from police forces in Great Britain and Northern Ireland. And therefore, armed with those experiences, I do not agree that the culture within Ofgem was not one of complete openness and transparency with police fraud investigations. On the contrary, it was my understanding that there was complete openness and transparency with police fraud investigations, subject to the statutory limitations that were in place at the time. I note in particular, that the Counter Fraud team was, and has been from time to time,

staffed with a number of ex- police officers. If anything therefore, the Counter Fraud team in particular displayed a willingness to fully cooperate with police fraud investigations. This willingness to fully cooperate with police fraud investigations was, in my view, fuelled by a desire by the Counter Fraud team to assist a police force to bring about the first ever successful prosecution for fraud in relation to the RHI scheme. To the best of my knowledge, during the lifetime of the GB and NI RHI schemes, the police in respect of those jurisdictions have never instigated a formal prosecution against an applicant or a participant on either of those schemes. To that extent therefore, if the Counter Fraud team's success can be measured by the number of successful prosecution that are brought, it can readily be appreciated that they would be desperate to fully cooperate with any police investigation. My role requires, inasmuch as I am able to, that I support the Counter Fraud team as best as I can to enable them to achieve their objectives.

b. Why did you not have Ms. Turnbull inform the police of exactly what material Ofgem held, and (on the basis of your concern about the scope of the DPA request) indicate that to provide that material Ofgem required an appropriately wide request?

In the email of my advice to Ms Turnbull, dated the 28 October 2016, I advised her, at paragraph 7, that we were at liberty to disclose the material that ofgem held, namely the audit report and the exchange of correspondence that had passed between the Authority and Stephen Brimstone. She was further advised that the Authority could only do so if, and only if the PSNI were to make a formal request for those pieces of information under section 29(3) of the Data Protection Act 1998, as the Authority can only divulge information following a request for specific information made under section 29(3) of the Data Protection Act 1998. The quandary for the Authority therefore, is that although it might be in possession of information that might be helpful to a police investigation, it cannot lawfully release that information, nor confirm its existence, other than in response to an appropriately worded request for the required



information made under section 29(3) of the Data Protection Act 1998.

- c. Given Ms. Turnbull appears to have wanted to provide documents she considered relevant to the investigation the police were conducting (indeed, she described them as “critical”), why was it not part of your role to provide advice that would put Ms. Turnbull into a position where she could provide the material she considered the police should receive?**

The primary responsibility of my role, was to provide Ms Turnbull with advice that was lawful, rather than advice that would put her into a position where she could provide the material she considered the police should receive. I did not consider it possible to provide Ms Turnbull with advice that would immediately put her into a position where she could provide the material she considered the police should receive. However, she was advised that the material could be disclosed following a request for it under section 29(3) of the Data Protection Act.

What is more, although Ms Turnbull had described the documents as being *critical*, in my view they were not, as nothing in them and the conclusions that they reached would have assisted the police in the pursuance of a criminal prosecution against Stephen Brimstone. I am of that view, because the material appeared to confirm that no offence of fraud had been committed in the context of the RHI application that had been submitted to us. Indeed, I advised Ms Turnbull accordingly in my email (OFG-210233) to her dated 28 October 2018, timed at 15.53.

- d. You informed Ms. Turnbull that Ofgem should only assist the PSNI with its investigation “if we are convinced that they have good reasons to be investigating him”. When and how did it become part of Ofgem’s role to assess and satisfy itself about the veracity of a police fraud investigation before being prepared to provide documentation?**



Ofgem, the Authority, has to tread a fine line between the requirements of the police to assist them with the provision of information on the one hand, and the rights of a data subject, not to have his personal information divulged, on the other. Therefore, it would not be appropriate for the Authority to respond to a request for information that was made other than in accordance with the law.

Among the papers that I have been served with under this section 21 Notice, is a copy of the section 29(3) Data Protection Act request for information. The original Notice consists of two pages. However, I was only served with page 1 of the notice (OFG-44935) by the Inquiry when it asked me to provide this witness statement. On page 2 of the Notice, under the heading 'Miscellaneous' it is clearly stated that *"This exemption [the section 29(3) exemption] can only be used if, you are urgently requesting information in order to prevent injury or other damage to the health of an individual."* Therefore, if there is no risk of injury or damage to an individual, the police ought not to be using the section 29(3) process to request information. Further, at note 4 on page 2 of the Notice, its guidance clearly states that *"Please state what information you require to support your inquiry. You should not ask for "all information known about the individual" or similar. Additionally, you must ask for specific information, if in doubt discuss the matter with the data controller.* The guidance provided by note 4 is quite clear, and doesn't really require any elaboration from me, other than to state that the section 29(3) process should only be used if there is a risk of injury or damage to health of an individual. This request for information, was being made in the context of an RHI fraud investigation, in which it was not made clear how the risk of injury or damage to health of an individual might arise. Further, the process ought not to be used as a fishing expedition just to gain intelligence about an individual.

Furthermore, at note 5 on page 2 of the Notice, its guidance clearly states *"Please give enough information so that the data controller can make a decision whether to disclose in accordance with your declaration*



(para 5)” What the guidance recognises, is that Ofgem, the data controller, must be provided with sufficient information to enable it to make a determination as to whether or not it should supply the information requested. Given that the information request was being made in the context of and RHI fraud investigation, I would have thought that Ofgem was well placed to determine whether the police had good reasons to be investigating Stephen Brimstone; by which I mean the police had ensured that the terms of the Data Protection Act 1998 were being complied with, particularly as they were requesting information to assist their investigation from us. In that regard, I consider that it was entirely appropriate for the Authority to satisfy itself about the veracity of the police fraud investigation, before being prepared to provide documentation, in circumstances where the Authority had not itself initiated the fraud investigation by expressing concerns it may have had to the police.

Moreover, at note 7 on page 2 of the Notice, it is clearly stated that *“This form should not be used...for general intelligence...The Investigating and Authorising Officers should be aware that they are each making a statement that the conditions are true and that obtaining personal data under false pretences may be a criminal offence.* What the guidance recognises, it that it is quite a serious matter, involving a criminal offence, to obtain personal data under false pretences under the section 29(3) process.

Given the need to comply with section 29(3) of the Data Protection Act 1998, It seemed perfectly reasonable to me that I should advise Ms. Turnbull that Ofgem should only assist the PSNI with its investigation *“if we are convinced that they have good reasons to be investigating him”*. I formed that view, because, I considered that it was part of Ofgem’s role to assess and satisfy itself about the veracity of the police fraud investigation before being prepared to provide documentation.



- e. **If the police were conducting a fraud investigation into an RHI application, and said so to Ofgem, on what basis could Ofgem consider that the police request for information could be viewed as “speculative”?**

Please see my answer to question d above. Further, Ofgem could rightly consider that the police request for information could be viewed as “speculative, based upon the content of the request itself, and if the authority was of the view, based on its own knowledge of the facts, that the applicant did not have a case to answer.

- f. **Were the steps that you took, and the advice that you gave, overseen by your line managers in the Ofgem Legal Department? If so, did they concur with the approach you were taking?**

It must be remembered that I am engaged as a Senior Legal Advisor with the Authority. As such, despite the fact that I do have a line manager, I do have sufficient autonomy over the advice that I provide. That said however, I can and do approach my line manager as a sounding board, or for him to provide a second or alternative opinion on an issue.

The steps that I took in this particular matter were overseen by my line manager, inasmuch as I did have some early discussions with him about it, when he was able to provide a steer. Further, he was copied into the email exchanges that I had with my policy clients. However, I alone took the decision not to disclose the audit report to the police, as I recall he was on annual leave when that decision was made. So he wouldn't have been aware of it until his return from leave and after it had been made. He was on leave between Friday 28 October to Friday 4 November 2016, inclusive; and Monday 14 November to Friday 25 November 2016.

Although my line manager agreed with the approach that I took in this matter, having provided a steer on it, in the context of the report produced by Deloitte, he did confirm that he would 'probably' have provided the report to the police. That said however, although he and I will often discuss issues in relation to my work, his view does not always prevail over mine.

- g. Do you accept that the appropriate response from Ofgem to the request for information from police carrying out a fraud investigation involving the use of public funds, is to inform the police of the material Ofgem holds relevant to that investigation, and then ensure Ofgem obtains a request wide enough to provide the police with that material?**

For the reasons I have already explained above, I did not consider it would have been an appropriate response for Ofgem to inform the police of the material it held. Particularly as that material did not appear to suggest that a criminal offence had been committed by Stephen Brimstone.

In the final analysis, the Authority did confirm to the police the existence of the audit report, and that it had concluded its own investigation into allegations of fraud against Stephen Brimstone. This was intended, and did enable them to submit a revised section 29(3) request for information, with a view to obtaining both the audit report and the findings of the Authority's investigation.

On 25 May 2017 Deloitte produced a report, requested by the Ofgem Chief Operating Officer, *"to provide an independent examination of the facts relating to concerns raised over a particular participant's entitlement to claim under the Scheme and undertake further enquiries as is considered necessary, documenting the results of these procedures"*. The report addressed the question of engagement with the PSNI. (**OFG 200494 to OFG-200516**).

7. **As to this:**

- a. **Did you have the opportunity to contribute to the process leading to the report? Please explain your answer.**

No, I did not have an opportunity to contribute to the process leading to the report, inasmuch as I was not one of the person who was interviewed by the report's authors. That said however, my line manager was interviewed by them, and I did provide him with a verbal account of my conduct of the matter, and the documents that accompanied it.

- b. **The report notes that your line manager (Michael Knight) was copied on all email correspondence in which your advice was provided, including the decision to conclude the matter (OFG-200512). What was Michael Knight's input into the advice you provided?**

As I have explained above, Michael and I did discuss the matter before I provided my advice. And he was able to give me a steer. Essentially, his view was that we should only provide information if the police requested it in accordance with section 29(3) of the Data Protection Act. Notwithstanding that he was copied in on my email exchanges with Samantha Turnball, Michael did not however have any input on my decision to withhold the audit report as he was on annual leave when that decision was taken and did not learn about it until after he had returned from leave.

- c. **If there is anything else you want to say to the Inquiry about the report, or its findings, please set it out here.**

There is nothing else I would like to say to the Inquiry about either the report or its findings, other than to point out, that although I was made aware of the existence of the report, it was not until I was served with the



section 21 Notice, under this Inquiry, that I have been able to see it.

8. **Do you consider that Ofgem's approach to the disclosure of information to the PSNI in the Brimstone case was reflective of a general culture within the Ofgem in relation to information-sharing, whether with the police or others? Please explain your answer.**

This question presupposes that there existed within Ofgem a culture of non-cooperation to approaches for request for information either by the PSNI or other. It is not my understanding that such a culture does or has ever existed. As you will have seen from the conduct of this Inquiry, policy colleagues within Ofgem would always seek advice on the nature of any information request received. Whilst the lawyers that advised them would always be concerned to operate within the constraints imposed on the Authority's ability to share information by the Data Protection Act 1998.

General

9. **Considering the RHI Inquiry's Terms of Reference, please identify any representations made to you about the RHI Scheme (which you regard as significant and about which you consider the RHI Inquiry should be aware), whether those representations were made by colleagues, or otherwise. In respect of any such representations please indicate when they occurred, where they occurred, who was involved, and what was said or communicated to you.**

I am not aware of, nor do I recall any representations having been made to me about the RHI Scheme, that I would regard as significant and about which I consider the RHI Inquiry should be made aware of.

10. **Considering the RHI Inquiry's Terms of Reference, please identify any conversations or discussions you had about the RHI Scheme (which you regard as significant and about which you consider the RHI Inquiry should be aware), whether those conversations or discussions involved**



colleagues, or otherwise. In respect of any such conversations or discussions please indicate when they occurred, where they occurred, who was involved, and what was said to you.

I am not aware of, nor do I recall having had any conversations or discussions about the RHI Scheme, that I would regard as significant and about which I consider the RHI Inquiry should be made aware of.

11. **Provide any further evidence within your knowledge or belief which is relevant to the matters which the RHI Inquiry is investigating as set out in the RHI Inquiry's Terms of Reference.**

I do not have any further information to add.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed: John Jackson

Dated: 6 December 2018