



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 8 of May 2006

PART 1

Public Authority: The Office of Gas and Electricity Markets
Address: 9 Millbank
London
SW1P 3GE

Nature of Complaint

The Information Commissioner ("the Commissioner") has received a complaint from the Complainant which states that the following was requested from The Office of Gas and Electricity Markets ("OFGEM") under section 1 of the Freedom of Information Act 2000 ("the Act"):

- (1) Complete, unabridged and un-redacted information on the accuracy of domestic meters, including the names of manufacturers (*"Domestic Meter Information"*);
- (2) Complete, unabridged and un-redacted disclosure of Transco Metering Limited's ("Transco") Annual Report on In-Service Performance of Domestic Meters – 2003 Test Data (*"Transco Report"*); and
- (3) Information on the performance of non-domestic gas meters (*"Non-Domestic Meter Information"*).

It is alleged that OFGEM failed to provide the Complainant with the above information in accordance with its obligations under section 1(1) of the Act because it has incorrectly applied the exemption at section 44 of the Act ("section 44").

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

1. *Domestic Meter Information*

OFGEM has in its Refusal Notice to the Complainant dated 31 January 2005, cited the exemption at section 44 (1) (a) of the Act. This states that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it...is prohibited by or under any enactment...”

OFGEM asserts that they are prevented from releasing this particular information in a complete and unabridged manner because of the statutory prohibition contained within section 105 of the Utilities Act 2000 (“section 105”).

Section 105 (1) (a), (b) and (2) states that:

“Information which has been obtained under or by virtue of the provisions of this Act, Part 1 of the 1986 [Gas] Act or Part 1 of the 1989 [Electricity] Act; and relates to the affairs...of any particular business, shall not be disclosed...so long as the business continues to be carried on, except...made with the consent of...the person for the time being carrying on the business.”

After a careful evaluation by the Commissioner of: the information on the file; the submissions received from both parties; and section 105, the Commissioner is satisfied that the criteria necessary to invoke the statutory prohibition contained in section 105 have been met. Consequently, and in the particular circumstances of this case, it is the Commissioner’s decision that OFGEM has correctly applied section 44 of the Act to withhold the *Domestic Meter Information*.

A further explanation of this decision is provided in the Statement of Reasons, which is in Part 2 of this Decision Notice.

2. *Transco Report*

OFGEM has in its Refusal Notice to the complainant dated 28 February 2005 cited the exemption at section 44 (1) (a) of the Act.

OFGEM also assert that they are prevented from releasing this particular information in a complete and unabridged manner because of the statutory prohibition contained within section 105. OFGEM has also advanced identical arguments with respect to this request as expressed in 1 (above).

After a careful evaluation by the Commissioner of: the information on the file; submissions received from both parties; and section 105, the Commissioner is satisfied that the criteria necessary to invoke the statutory prohibition contained in section 105 have been met. Consequently, and in the particular circumstances of this case, it is the Commissioner’s decision that OFGEM has correctly applied section 44 of the Act to withhold the *Transco Report*.

A further explanation of this decision is provided in the attached Statement of Reasons, which is in Part 2 of this Decision Notice.

3. *Non- Domestic Meter Information*

In a letter dated 27 June 2005, OFGEM had advised the Complainant that following a search of their paper and electronic records, they were not in possession of this

requested information because ‘...Ofgem only holds information relating to the performance of non-domestic gas meters to the extent that relates to gas meter accuracy disputes. This formed part of the information disclosed to you on 18 April 2005’. In their letter to the Commissioner dated 31 August 2005, OFGEM also confirmed that it was not in possession of this information.

In a telephone conversation with the ICO on 4 May 2006, the Complainant confirmed his acceptance of the above statement from OFGEM, and has further agreed to withdraw this particular complaint. Consequently, and by virtue of section 50(2) (d) of the Act, the Commissioner will not make a decision on the complainant’s request for the *Non-Domestic Meter Information*.

The Commissioner will limit his response on this particular aspect of the complaint to this part of the Decision Notice.

Public Interest Test

Section 44 of the Act is an absolute exemption, which means that the Public Interest Test provided for in section 2 of the Act does not apply.

Action Required

The Commissioner does not require OFGEM to take further action with relation to this complaint.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the “Tribunal”). Information about the appeals process can be obtained from:

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|-----------------------------|---|
| Information Tribunal | Tel: 0845 6000 877 |
| Arnhem House Support Centre | Fax: 0116 249 4253 |
| PO Box 6987 | Email: informationtribunal@dca.gsi.gov.uk |
| Leicester | |
| LE1 6ZX | |

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

Dated the 8th day of May 2006

Signed:

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

PART 2

STATEMENT OF REASONS

1. Background

- 1.1 The origin of this complaint pre-dates the coming into force of the Act on 1 January 2005. It has arisen from a series of requests made to OFGEM by the Complainant, for the release of information relating to the accuracy of gas and electricity meters tested by OFGEM; and other data held by OFGEM relating to meter accuracy. From the information provided to the Commissioner, the request covers the provision of testing data from the “*gas meter disputed accuracy service*”, covering the period 31 January 2003 to 1 February 2004.

This testing data is made up of the:

- (a) *Domestic Meter Information;*
- (b) *Transco Report;* and
- (c) *Non-Domestic Meter Information.*

The Commissioner does not intend to deal with the request for the information in (c) (above), within this part of the Decision Notice because the complaint has been withdrawn by the complainant.

1.2 Domestic Meter Information

On 2 January 2005, the Complainant made a formal request for the release of the *Domestic Meter Information* under the Act. In his e-mail to OFGEM he stated:

“Please confirm that you are prepared to release data that includes the names of meter manufacturers that you have previously refused. This is really the sticking point and the issue to be sorted by agreement or by reference to the commission[er]”.

In its Refusal Notice to the Complainant dated 31 January 2005, OFGEM cited the exemption at section 44 (1) (a) of the Act. This states that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it...is prohibited by or under any enactment...”

OFGEM’s contention is that they are prevented from releasing this particular information in a complete and unabridged manner because of the statutory prohibition contained within section 105 of the Utilities Act 2000 (“section 105”).

Section 105 (1) (a), (b) and (2) states that:

“Information which has been obtained under or by virtue of the provisions of this Act, Part 1 of the 1986 [Gas] Act or Part 1 of the 1989 [Electricity] Act; and relates to the affairs...of any particular business, shall not be disclosed...so long as the business continues to be carried on, except...made with the consent of...the person for the time being carrying on the business.

In addition, OFGEM also cited section 105 (9) which states that: *“ a person who discloses any information in contravention of this section is guilty of an offence”.*

On 1 February 2005, the Complainant requested an internal review of this decision by OFGEM.

OFGEM’s Review Panel agreed that the exemption set out in section 44 of the Act was applicable to the request and confirmed that the original decision not to disclose the *Domestic Meter Information* was correct. However, (and after consultations and negotiations between OFGEM and the meter manufacturers) the Review Panel released a redacted and modified version of the *Domestic Meter Information* to the Complainant. The redactions and modifications covered the *‘removal of the manufacturers’ names and meter types; and included additional caveats to provide context to the value of the information in relation to the meter population’.*

The Complainant was dissatisfied with the information released. In his opinion, the disclosed (redacted) information was *“worthless”* without the names of the meter manufacturers.

1.3 Transco Report

On 1 February 2005, the Complainant made a formal request for the release of the *Transco Report* under the Act. In his e-mail to OFGEM he stated:

“I would like you to forward the Transco data that you hold which would not be covered by the legal restrictions you mentioned in your letter”.

In their Refusal Notice dated 28 February 2005, OFGEM informed the Complainant that following the statutory prohibition contained within section 105, the information he requested was being withheld as it fell under the exemption set out in section 44 of the Freedom of Information Act 2000. This interpretation of section 105 and the exemption in section 44 of the Act was upheld by the Review Panel. Likewise, as in the case of the *Domestic Meter Information* (and after negotiations with Transco), the Review Panel released a redacted and modified version of the *Transco Report* to the Complainant. The redactions and modifications also covered *‘the removal of the manufacturers’ names and references within the report (both personal and commercial); and included a cover sheet to provide context to the value of the information in relation to the meter population currently installed.’*

Being dissatisfied with the redacted information released, the Complainant made a complaint to the Commissioner.

2. Applicability of section 105 to the Requested Information

2.1 The complaint has arisen because of OFGEM's decision not to release the *Domestic Meter Information* and *Transco Report* (jointly referred hereinafter as the "*Requested Information*"). In reaching this decision, OFGEM maintained that the combined effect of section 105 of the Utilities Act and section 44 of the Act precluded them from releasing the *Requested Information*.

2.2 On 3 August 2005, the Information Commissioner's Office ("the ICO") informed the Complainant that:

"Section 44 of the Act is an absolute exemption, which means that if information is covered by any of the subsections in section 44 then it is exempt from disclosure. S 44 (1) of the Act covers information which is prohibited from disclosure under other legislation. I can confirm that if the information you requested is caught under Section 105, Ofgem would have validly applied the Act, and consequently cannot be compelled to release the information that you desire."

2.3 In order to establish whether section 105 applies (and therefore whether the *Requested Information* falls within the exemption at section 44 of the Act), there are two issues to be determined by the Commissioner. The first is whether the *Requested Information* was obtained under or by virtue of the provisions of the Utilities Act 2000, Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989. The second question – which arises only if the first question is answered in the affirmative – is whether OFGEM has complied with the requirement in section 105 relating to consent.

2.4 *Was the Requested Information obtained under the Gas Act 1986 or Electricity Act 1989?*

2.4.1 In his e-mail to the ICO dated 9 October 2005, the Complainant stated:

"I do not think there is anything specific in legislation relating to Transco providing Ofgem with results of the meter testing they undertake. Moreover Ofgem have declined to release the makers names of meters they have tested themselves where Transco have not been involved."

2.4.2 On 12 October 2005, the ICO wrote to OFGEM requesting that they provide specific clarification on how the *Requested Information* was 'obtained under or by virtue of the provisions' of the Utilities Act and Gas Act.

2.4.3 In their response dated 21 October 2005, OFGEM provided the following explanation:

"Transco Report.

Under paragraph 3(3) of Schedule 2B The Gas Code of the Gas Act 1986, gas transporters are required to keep meters in proper order for correctly registering the quantity of gas supplied. Transco, as a gas transporter, through their metering business (Transco Metering Services), demonstrates their compliance with this obligation. Under section 34(1) of the Gas Act 1986, the Authority has

a duty to collect information. In addition standard licence condition 24 of the gas transporter's licence requires the licensee to "furnish such reports as the Authority may reasonably require" for the purpose of performing functions conferred on it by the Gas Act".

As these are gathered under the above Ofgem powers this leads us to the general restriction on the release of information under section 105 of the Utilities Act. Section 105 is included in the provisions of section 44 FOIA.

Gas Meter Testing Report (i.e. the Domestic Meter Information)

The re-examination of stamped meters is carried out on Ofgem's behalf, under an outsourcing agreement with a private contractor, under the terms of section 17(9)(a) of the Gas Act 1986. Without production of occasional reports and statistical information Ofgem would be unable to determine that these services are being carried out correctly, and that the persons appointed under section 17(6) are maintaining competence and impartiality.

Once again therefore the information arises from our statutory duties and is procured under the terms of section 17 of Gas Act, leading through to the same conclusion i.e. that section 105 UA applies."

2.4.4 Having considered the above comments, and reviewed the statutory provisions cited, the Commissioner is satisfied with the explanations provided by OFGEM. Therefore it is the Commissioner's view that the *Requested Information* has been obtained in accordance with section 105.

2.5 *Has the consent criterion under section 105 been fulfilled?*

2.5.1 OFGEM has submitted the correspondence which records the consultations, negotiations and other events relating to the Complainant's request. The correspondence primarily consists of:

- (i) Letters exchanged with OFGEM's service provider for metrology functions, and six meter manufacturers on the issue of full disclosure of the *Domestic Meter Information*, and the consent to OFGEM's proposal to release a redacted and abridged version of the *Domestic Meter Information*;
- (ii) Correspondence between OFGEM and the Complainant, in which the Complainant is provided with a list of the manufacturers that had been contacted in connection with the *Domestic Meter Information*; and
- (iii) Letters exchanged with Transco on the issue of full disclosure of the *Transco Report*, and its consent to OFGEM's proposal to release a redacted and abridged version of the report.

2.5.2 Domestic Meter Information

In connection with OFGEM's initial request to the manufacturers and service provider on 17 January 2005 to provide full disclosure of the *Domestic Meter Information*, three companies consented to full disclosure (including the service provider), two companies provided conditional consent to disclosure on the basis that the names of the manufacturers were withheld, and two companies did not consent (one expressly and the other by not responding). Consequently, OFGEM decided that it could not disclose *the Domestic Meter Information* as it had not received the unanimous consent of all the parties to which the information related. In the note of the meeting of OFGEM's Review Panel on 28 January 2005, OFGEM decided not to disclose any of the *Domestic Meter Information*, even those parts which only related to the consenting parties, for the following reason:

"it was agreed that partial disclosure was inappropriate in this case because information in relation to those meter manufacturers not consenting could be deduced from partial disclosure."

- 2.5.3 Subsequently, OFGEM agreed with the meter manufacturers and its service provider the form in which the *Domestic Meter Information* could be disclosed and it was disclosed to the Complainant on 18 April 2005 a redacted and abridged form which did not identify any of the manufacturers.
- 2.5.4 The Commissioner has therefore considered whether section 105 requires the unanimous consent of every party to which information relates and whether OFGEM could have provided partial disclosure of the *Domestic Meter Information*, identifying only those parties who had provided full consent, without breaching the provisions of section 105.
- 2.5.5 Section 105 refers to "*information which...relates to any individual or to any particular business*" and states that it shall not be disclosed without the consent "*...of the person for the time being carrying on the business.*" As such, it can be argued that the withholding of consent by one manufacturer in relation to disclosure of its meter testing data should not preclude the disclosure of data which relates to another manufacturer.
- 2.5.6 Nonetheless, given the comparatively small number of manufacturers involved, the Commissioner is satisfied that OFGEM correctly applied section 105 by not providing the *Domestic Meter Information* in a partially redacted form as this would, in all probability, have had the consequence of disclosing information relating to non-consenting parties as they would have been easily identifiable from the information disclosed. As set out in an internal OFGEM memo to the Review Panel of 26 January 2005 ("OFGEM Memo") "*...due to the relatively small number of manufacturers and [with] some knowledge of historical meter procurement patterns (up to the 1990's there were only two manufacturers supplying new domestic meters) it would be simple to deduce the manufacturers from any redacted information disclosed.*"

2.5.7 Transco Report

The situation regarding the *Transco Report* is more clear-cut with Transco refusing consent to disclosure on 18 February under section 105. Although the *Transco Report* contains information relating to the various meter manufacturers (and would also have required the consent of such manufacturers to any disclosure), as the report as a whole relates to Transco's business, Transco's lack of consent means that the Commissioner considers that OFGEM were correct in refusing to disclose the *Transco Report* further to section 105 and section 44 of the Act.

2.5.8 Further to an internal review and discussions between the parties, Transco agreed to produce a redacted version of the *Transco Report* which it prepared itself and which was issued to the Complainant on 23 May 2005.

3. Section 43 – Commercial interests and Public Interest Test

3.1 The Commissioner also noted the exemption in section 43(2) of the Act to the extent that it may be argued that the *Requested Information* should have been disclosed more fully (for example, by disclosing data which related exclusively to parties which had consented).

3.2 Section 43(2) of the Act states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

As this exemption is a qualified exemption, further to section 2(b) of the Act, the public interest test would need to be applied in relation to it.

3.3 There is evidence that consideration was given by OFGEM to the commercial interests of the parties concerned and the public interest in making the decision not to disclose the *Requested Information*. For instance, in the *OFGEM Memo*, it was argued that *“...disclosing only information where manufacturers fully consented would further skew the statistics – manufacturers consenting arguably see commercial benefit from disclosure and adverse inferences may be drawn [from] a particular manufacturer's refusal to give consent.”*

3.4 Additionally, in its letter to the ICO of 31 August 2005, OFGEM argued that commercial interests and public interest considerations were additional factors which could be seen to reinforce its decisions, stating, in relation to the *Transco Report*, that: *“even were it not in breach of s105UA, if we were to release the ... [Transco Report]... Transco have indicated they would not supply it to us in the future. While, we recognise that no Public Interest test is required for a S44 withhold, in effect it would therefore not be in the public interest as this could seriously inhibit the regular review of meter efficiency, and result in OFGEM not being able to carry out this part of its duties in future.”*

- 3.5 The Complainant, on the other hand, has maintained that the public interest supports disclosure of the *Requested Information*, stating in a letter to the ICO dated 8 June 2003 that: “*the [redacted] information [OFGEM] have released indicates there is a massive problem with gas meters, as I feared all along. The public have a right to know which makes of meter are so unreliable and which ones are most likely to be accurate.*”
- 3.6 Ultimately, OFGEM (correctly, in the Commissioner’s view) has based its final decision not to disclose both parts of the *Requested Information* on section 44 with OFGEM’s FOIA Review Panel stating, in relation to the *Domestic Meter Information* that “[*as] this was an absolute bar to disclosure it was agreed that no further exclusions would be considered.*” Consequently, the Commissioner is satisfied that in this case, it is unnecessary for him to further determine the applicability of section 43 (i.e. the prejudice of commercial interests and the public interest test) because it would only be an academic exercise, which has been made irrelevant by the proper application of section 44.

4. Conclusion

In view of the above, the Commissioner is satisfied that in this particular case, OFGEM has interpreted the requirements of section 105 correctly by withholding the *Requested Information*. The Commissioner has established that the *Requested Information* is of a type which is covered by this section of the Utilities Act; and secondly that OFGEM did not obtain the consent of all the parties necessary in order for it to be able to disclose the *Requested Information* in the form requested, without breaching section 105. Consequently, the Commissioner is satisfied that the *Requested Information* is exempt under Section 44 of the Act.

The Commissioner’s Decision

In these circumstances the Commissioner is satisfied that OFGEM has correctly applied the exemption in Section 44 (1) (a) of the Act to withhold the *Requested Information*. Therefore the Commissioner’s decision in this matter is that OFGEM has dealt with the Complainant’s request in accordance with the requirements of Part 1 of the Act.