

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 March 2012

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

#### Decision (including any steps ordered)

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1. The complainant has requested the name of the hotel where the Chief Executive of Ofgem stayed on specific dates, as well as the times on which he checked in and out of the hotel. Ofgem withheld the name of the hotel under the health and safety exemption (section 38) and the exemption for third party personal information (section 40(2)). It also informed the complainant that it did not hold recorded information showing the check in and check out times.
2. The Commissioner's decision is that Ofgem has correctly relied upon section 40(2) to withhold the name of the hotel. He is also satisfied that Ofgem does not hold any recorded information showing the check in and check out times of the Chief Executive.
3. Therefore the Commissioner does not require Ofgem to take any additional steps.

#### Request and response

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4. On 5 August 2011, the complainant wrote to Ofgem and requested information about expense claims by Mr Alastair Buchanan (Ofgem's Chief Executive) relating to 28 and 29 March 2011. Specifically he requested:
  - The name or details of the hotel where Mr Buchanan stayed on those nights.
  - What discounts were obtained?

- What time did he check in and out?
- What sort of room did he have?
- Whether he charged for any drinks.

For ease of reference these will be referred to as requests (1) to (5).

5. Ofgem responded on 7 September 2011 and stated the following:

- Request (1) – this information was withheld under sections 38 and 40.
- Request (2) – *“This booking was made under a corporate contract negotiated by the Office of Government Commerce which negotiates preferential rates on behalf of Government.”*
- Request (3) – this information was not held.
- Request (4) – *“A standard room.”*
- Request (5) – *“No drinks were charged for.”*

6. The complainant requested an internal review on 7 September 2011. In particular he argued that the name of the hotel was not exempt, and that the check in and check out times were held.

7. Following an internal review Ofgem wrote to the complainant on 26 October 2011. It again refused to provide the information that fell under request (1), stating that the disclosure of this information would contravene Mr Buchanan's privacy. It also argued again that it did not hold any information that fell under request (3).

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner wrote to the complainant on 30 January 2012 and informed him that the scope of his investigation would be to consider whether the information that fell under request (1) was exempt under sections 38 and 40, and whether any information was held that fell under request (3).

## Reasons for decision

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10. The Commissioner has initially considered Ofgem's use of section 40 to withhold the information that falls under request (1).

### **Section 40(2) – third party personal information**

11. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
12. In the refusal notice Ofgem cited the condition contained in section 40(3)(a)(ii) of the FOIA. This applies where the disclosure of information would contravene a notice served under section 10 of the Data Protection Act 1998 (the "DPA"). However, in the internal review it did not specifically cite any of the provisions of section 40 – although it referred to Mr Buchanan's right to privacy.
13. During the investigation of the case the Commissioner asked Ofgem to clarify which part of section 40 it believed applied to this information. In its response, Ofgem referred to section 40 containing "general provisions for privacy" for individuals. However, it did not provide the clarification the Commissioner had requested.
14. Bearing in mind his dual role, as regulator of the FOIA and the DPA, the Commissioner has first considered whether this information is exempt from disclosure under section 40(2) with section 40(3)(a)(i).
15. The condition contained in section 40(3)(a)(i) applies where the disclosure of requested information to any member of the public would contravene any of the principles of the DPA. This is an absolute exemption, and is therefore not subject to the public interest test.
16. In order to establish whether this exemption applies the Commissioner has first considered whether the withheld information is the personal data of a third party.
17. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
18. In this case, the withheld information clearly relates to an identifiable individual, and the location where he stayed overnight on specific dates. Bearing in mind that this information relates to the movements of a specific individual on specific dates, the Commissioner is satisfied that this information is the personal data of that individual.

19. The Commissioner has gone on to consider whether the disclosure of this information would be a breach of any of the principles of the DPA. He has initially considered whether disclosure would breach the first data protection principle which requires, amongst other things, that personal data is processed fairly.
20. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
21. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
  - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - the individual's reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
22. Ofgem has provided very limited arguments to support its use of this exemption. It has referred to the individual's right to privacy, and has stated that when its employees are staying at a hotel for business purposes they have a reasonable expectation of privacy. It has also referred to the potential for harassment given the high profile nature of energy issues.
23. The Commissioner notes that Ofgem has confirmed that this hotel is often used by its employees – indeed, the same hotel was used by Mr Buchanan on both the dates in question. Given the senior position of Mr Buchanan and Ofgem's role in regulating the energy market, together with the high profile nature of energy issues, the Commissioner is satisfied that were this information to be disclosed, it would increase the likelihood of this individual being contacted by members of the public or the press whilst staying at this hotel again in the future. Whilst the Commissioner accepts that Mr Buchanan is a very senior figure at Ofgem, he considers that he would have a reasonable expectation of privacy whilst staying overnight at a hotel for business purposes. Bearing this in mind, and given the nature of the use of a hotel as a place of accommodation, the Commissioner is satisfied that contact here by members of the public or the press could have a harassing effect on that individual.
24. Therefore, after taking these factors into account, the Commissioner considers that the disclosure of this information would be an invasion of the privacy of the individual concerned.

25. In relation to the legitimate interests in disclosure of this information, the Commissioner considers that there is a public interest in increasing transparency into the expenditure of public money through expense claims by public authority employees. In addition, the complainant has argued that it is necessary to know the name of the hotel in order to check the cost of a room.
26. However, the Commissioner notes that Ofgem already publishes a considerable amount of information about the expenses of its senior staff on its website.<sup>1</sup> In addition to this, he also notes that Ofgem has now confirmed to the complainant the cost of the hotel rooms on the dates in question (see paragraph 39 below). Bearing this in mind, the Commissioner considers that the legitimate interest in disclosure has been somewhat met.
27. These legitimate interests have to be balanced against any negative impact to the rights and freedoms of the individual concerned. Taking into account his findings that the disclosure of this information would be an invasion of the privacy of this individual, the Commissioner finds the arguments in favour of withholding the information particularly weighty.
28. Taking all these factors into account, the Commissioner considers that the disclosure of this information would be unfair and in breach of the first principle of the DPA. Therefore this information is exempt from disclosure under sections 40(2) with 40(3)(a)(i).
29. As he has found that this information is exempt under section 40, the Commissioner has not gone on to consider Ofgem's use of section 38 in this case.
30. The Commissioner has gone on to consider whether Ofgem holds any information that falls under request (3).

### **Request (3) – is any relevant information held?**

31. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled –
  - to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - if that is the case, to have that information communicated to him.

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<sup>1</sup> <http://www.ofgem.gov.uk/About%20us/transparency/sd/Pages/sd.aspx>.

32. The complainant has argued that the check in and check out times are held, as they will be clearly stated on the invoice and credit card receipts.
33. In cases such as this the standard of proof to apply in determining whether a public authority holds requested information is the civil standard of the balance of probabilities.<sup>2</sup> In deciding where the balance lies, the Commissioner will consider the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information is held, including whether it is inherently unlikely that the information so far located represents the total information held.
34. Therefore the Commissioner has considered whether, on the balance of probabilities, Ofgem holds any information that would fall under this request. In doing so he has particularly borne in mind any explanation as to why the requested information is not held.
35. In its correspondence with the complainant Ofgem has maintained that the requested information is not held, and is not shown on the invoices. It has explained to the Commissioner that it has no formal record of the time when Mr Buchanan checked in and out as the transaction was completed as 'cardholder not present' via a Government Procurement Card issued to another member of staff. Therefore no credit card slip was produced at the time this individual left the hotel. It has confirmed that it has located the relevant invoices, but that these do not show the times at which Mr Buchanan checked in and out of the hotel on the dates in question.
36. The Commissioner notes the complainant's comments as to why he believes that the requested information is held. However, despite the complainant's obvious belief that relevant information is held, the Commissioner also notes that he has not provided any evidence to support this belief.
37. Having considered Ofgem's arguments as to why the requested information is not held, the Commissioner considers that they are reasonable and persuasive. Given this, and without any evidence to the contrary, the Commissioner is satisfied that on a balance of probabilities Ofgem does not hold information that would fall under request (3).

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<sup>2</sup> *Bromley et al v Information Commissioner & Environment Agency* [EA/2006/0072], para's 10 to 13.

## Other matters

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38. During the course of the investigation Ofgem informed the Commissioner that after reviewing the case again it had noted that its previous responses to the complainant contained several errors that needed to be corrected.
39. Following correspondence from the Commissioner, Ofgem contacted the complainant and told him that Mr Buchanan had made expense claims for 20 and 29 March 2011, rather than 28 and 29 March. It believed that this mistake had been made because of information it had published on its website. In this correspondence it also clarified that Mr Buchanan's expense claims on those dates were for, amongst other things, soft drinks. It provided further details of the actual drinks claimed for, and the cost of the rooms on each of those dates.
40. The Commissioner is concerned that the initial response to the complainant contained inaccuracies, and that this was not rectified by Ofgem at the internal review stage. However, he notes that these inaccuracies have now been brought to the complainant's attention by Ofgem, and clarification provided. Therefore, he intends to take no further action in relation to this matter.

## Right of appeal

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41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

42. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
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