

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2015

Public Authority: Office of Gas and Electricity Markets (Ofgem)

Address: 9 Millbank
London
SW1P 3GE

Decision (including any steps ordered)

1. The complainant has requested information regarding the calculation of the calorific value of gas used by gas supply companies when billing customers. The request comprised of 5 questions. Ofgem acknowledged that it held information relevant to the request but refused to provide the information under section 31- law enforcement, section 42 – legal professional privilege and section 44 – statutory prohibition on disclosure. During the Commissioner's investigation Ofgem also introduced the exemption provided by section 35 – development and formulation of government policy and explained that it did not hold the information requested in the third question of the request. However it said it was happy to provide direct answers to the first and fourth questions.
2. The Commissioner's decision is that by failing to provide the information requested in the first and fourth question to the complainant Ofgem breached section 1, however as that matter has been resolved by the issuing of this notice, the Commissioner does not require Ofgem to take any further action. The Commissioner is satisfied that Ofgem does not hold the information sought by the third question and that Ofgem is entitled to rely on section 44 to refuse the information sought by the second and fifth question. He has not gone on to consider the application of sections 31, 35 and 42.
3. The Commissioner does not require the public authority to take any further action in this matter.

Background

4. On 5 August 2014 Ofgem published an open letter on the calculation of average calorific values. This can be found at https://www.ofgem.gov.uk/sites/default/files/docs/2014/08/supplier_guidance_on_cv_calculation.pdf . The letter set out guidance for all domestic gas suppliers on how to calculate the calorific value of the gas they supply and explains that,

“Unlike electricity meters, which measure energy units directly, gas meters measure volume units. Because the amount of energy in a volume unit of gas can vary (known as its calorific value), gas suppliers convert the metered volume units to energy units to calculate customers’ bills. The price customers pay is therefore a function of the gas’s calorific value (CV) and the volume of gas consumed. The CV of gas varies across the country dependent upon the source of the gas. Consumers who receive gas with a higher CV typically pay a higher price per unit of volume gas than those who receive a lower CV gas. This is designed to be cost-neutral for consumers, because the greater level of energy contained in the gas they receive means that they require fewer units of gas to heat their homes, for example.”

5. Gas supply companies are required to calculate the average calorific value of the gas they supply in accordance with relevant licence conditions and regulations. If the correct method of calculating the average calorific value is not adopted there is a risk that customers could be overcharged.

Request and response

6. On 11 December 2014, the complainant wrote to Ofgem and requested information in the following terms:

“Are Ofgem aware of any gas supply companies calculating cv to more than one decimal place during the last three years?

If there were any please name them.

To what extent if any have consumers been overcharged collectively?

Have any or will any supply companies be fined?

If there were any on what date(s) did Ofgem become aware of these errors.”

7. Ofgem responded on 9 January 2015. It confirmed that it held information relevant to the request but refused to provide that information explaining that the information was exempt from disclosure under section 31 - prejudice to a public authority's law enforcement function, section 42- legal professional privilege, and section 44 - statutory prohibition on disclosure. It did however refer the complainant to its open letter of 5 August 2014.
8. Following an internal review Ofgem wrote to the complainant on 11 February 2015. It maintained its original position that the information was exempt from disclosure under the sections cited.
9. There were further developments during the course of the Commissioner's investigation. Ofgem advised the Commissioner that it now wished to rely on section 35 - formulation and development of government policy. Ofgem also applied, but later withdrew its application of, section 21 - information readily available to the applicant.
10. Ultimately Ofgem also informed the Commissioner that it was happy to provide direct answers to questions 1) "Are Ofgem aware of any gas supply companies calculating cv to more than one decimal place during the last three years?" and 4) "Have any or will any supply companies be fined?". To date Ofgem has not provided the complainant with these answers, but for the sake of expediency and with the express agreement of Ofgem, the Commissioner is able to provide those answers.
11. In answer to question 1) Ofgem is now happy to confirm that it did identify gas supply companies which were calculating cv to more than one decimal point during the three years leading up to the request being made.
12. In answer to question 4) it is also prepared to confirm that no fines have been imposed to date on any gas supply companies. Furthermore Ofgem has advised the Commissioner that it has no current investigations concerning calorific value.
13. In light of its response to question 4) Ofgem argued that question 5) no longer applies as it is conditional on fines having been imposed. For reasons that will be explained later, the Commissioner accepts this argument.
14. It also became apparent during the Commissioner's investigation that Ofgem considered it did not hold the information required to answer question 3) "To what extent if any have consumers been overcharged collectively?".

Scope of the case

15. The complainant contacted the Commissioner on 12 February 2015 to complain about the way his request for information had been handled.
16. In light of the developments described above the matters to be decided are as follows. Firstly although for all intents and purposes Ofgem has now complied with questions 1) and 4), the Commissioner will briefly consider any technical breaches relating to its handling of these questions.
17. Secondly the Commissioner will consider Ofgem's argument that question 5) is dependent on the answer to question 4), regarding the imposition of fines, being affirmative. If the Commissioner rejects Ofgem's argument he will consider whether any of the exemptions claimed by Ofgem provide grounds for withholding the information requested in question 5).
18. Thirdly the Commissioner will consider whether Ofgem holds sufficient information to answer question 3) regarding the overall amount customers have been overcharged. If the Commissioner finds that Ofgem does hold the information, he will go on to consider whether that information can be withheld under any of the exemptions cited.
19. Finally the Commissioner will consider the application of the exemptions to the remaining information. This will include the information requested at question 2) regarding the names of any companies found to be miscalculating the calorific values and, potentially, the information requested in questions 3) and 5).
20. The first exemption the Commissioner will consider is that provided by section 44, relating to statutory prohibitions on disclosure. This is because section 44 is an absolute exemption, i.e. it is not subject to the public interest test. If the Commissioner concludes that the exemption does apply to all the information which Ofgem wishes to withhold he will not go on to consider the application of the other exemptions.

Reasons for decision

Section 1 – duty to communicate information

21. Section 1 of FOIA requires a public authority to confirm whether it holds the requested information and if so, subject to any grounds for refusing the request, to communicate that to the applicant.
22. Ofgem informed the complainant that it held information relevant to his request. However having withdrawn its application of any exemptions in respect of the information requested in questions 1) and 4) it failed to communicate that information to the complainant. This is a breach of section 1(1)(b).
23. However as that information has now effectively been provided to the complainant, albeit via this decision notice, the Commissioner does not require Ofgem to take any further action.

Section 1 – information held

24. As explained immediately above the duty to communicate information is dependent on the requested information being held. In respect of question 3) "To what extent if any have consumers been overcharged collectively?" it became apparent during the Commissioner's investigation that Ofgem considered it was unable to answer this question as it lacked all the information necessary to calculate the overcharge.
25. In order to calculate the amount that customers had been overcharged Ofgem would need several pieces of information in respect of each gas company which it had found to be miscalculating the calorific value of the gas it supplied. This includes the amount by which the calorific value had been miscalculated, the number of customers and, what Ofgem referred to as, the profile of those customers. The profile of a customer concerns the amount of gas they actually use and any contractual terms and conditions which affect how much they pay, for example whether they obtain by gas and electricity from the same provider and their method of payment.
26. Ofgem knows the amount by which each company concerned was found to be miscalculating the calorific value of their gas. It also has a rough idea of the number of customers each of those companies supply gas to. However it does not know the profile of those customers.

27. Without the information on the profile of the customers affected Ofgem has argued that it is unable to produce any meaningful figure in respect of the extent to which customers have been overcharged collectively. The Commissioner accepts Ofgem's argument and finds that it does not hold the information requested at question 3).

Question 5 – relating to when Ofgem became aware of any errors.

28. The complainant asked at question 5) "If there were any on what date(s) did Ofgem become aware of these errors?" It followed the question regarding whether any companies had been fined for miscalculating calorific values. Ofgem argues that question 5) is dependent on the response to question 4) being that some gas companies were fined and as no companies were, question 5) falls away.
29. However the Commissioner does not accept this argument. Set within the broader context of all five questions, the Commissioner finds that the conditional element of question 5) could equally be interpreted as a reference to the initial question on whether any gas companies had been found to be miscalculating the calorific value of their gas.
30. Therefore the Commissioner considers that question 5) is in his view seeking, in respect of each company found to be miscalculating the calorific value of its gas, the dates on which Ofgem became aware of such errors. Therefore despite the response to question 4) being that no gas companies were fined, question 5 remains unanswered.
31. The Commissioner will now go on to consider whether those dates can be withheld under section 44 or any other of the exemptions cited.

Section 44 – statutory prohibition on disclosure

32. Section 44 of FOIA states that information is exempt if its disclosure is prohibited by, or under any enactment.
33. The Commissioner will consider the application of this exemption to question 2) the names of the company or companies found to be miscalculating the calorific value of their gas, and question 5) the dates on which Ofgem became aware of these errors.
34. In this case Ofgem explained that it is prohibited from disclosing the requested information by section 105 of the Utilities Act 2000 (UA 2000). Therefore the Commissioner's investigation has focussed on whether this provision does apply to the information requested in questions 2) and 5). If it does then the information would be exempt from disclosure under FOIA by section 44.

35. Amongst other things, section 105 of the UA 2000 provides that information which Ofgem has obtained under Part I of the Gas Act 1986 and which relates to the affairs of any particular business shall not be disclosed so long as the business continues to be carried on. The full text of the prohibition can be found at <http://www.legislation.gov.uk/ukpga/2000/27/contents> .
36. Gas supply companies have to abide by the conditions of their licence. The method for calculating the calorific value of gas is determined by Standard Licence Condition 22.7 (Calculation of kilowatt hours) and Regulation 3 of the Gas (Calculation of Thermal Energy Regulations 1996). Ofgem has a statutory function to ensure the licence agreement and the Regulations are complied with. This statutory function includes the power to investigate and take enforcement action including the imposition of financial penalties. The functions are set out in sections 28 to 38 of the Gas Act 1986 and fall within Part I of that Act.
37. Ofgem maintains that information from which it would have to extract the answers to the questions posed in the request, were obtained, in confidence, as part of an investigation into whether gas suppliers were calculating calorific values in accordance with the relevant standard licence condition and Regulations. That is, the information was collected pursuant to its functions under sections 28 to 38 of the Gas Act 1986 and is therefore covered by the statutory prohibition created by section 105 of the UA 2000.
38. The Commissioner accepts that it is self-evident that the requested information would have been gathered from such an investigation. The Commissioner has also been supplied with a list of the documents that Ofgem hold in connection with this investigation. As one would expect with an investigation of this type, it consists of outgoing and incoming correspondence with a number of gas companies, together with internal discussions of the issues that arose.
39. It is inevitable that for Ofgem to determine how gas suppliers were calculating calorific values and the amount, if any, which customers may have been overcharged, it would have obtained information from those companies about their practises. An integral part of the information gathered as part of that investigatory process would have been the names of the companies involved and the date on which Ofgem either became aware there was a potential problem or established that in fact there was no problem. In effect that names of the companies miscalculating the calorific value and the date on which this became apparent was obtained by Ofgem during the course of its investigation.
40. In light of the above the Commissioner is satisfied that the requested information was obtained by Ofgem for the purpose of an investigation

conducted under Part I of the Gas Act 1986. That information relates to ongoing businesses. The Commissioner is satisfied that this information is protected by the statutory prohibition contained in section 105 of the UA 2000.

41. However, section 105 of the UA 200 contains, what are commonly referred to as, 'gateways'. Each gateway provides that information can be disclosed so long as certain criteria is met. The gateways are set out in subsections 3 to 6 of section 105. Ofgem has advised the Commissioner that none of the conditions set out in these subsections can be satisfied. Having considered the gateways the Commissioner accepts Ofgem's argument that none of the conditions can be met in respect of a disclosure under FOIA in this case. It follows that the statutory prohibition created by section 105 UA 2000 stands. The information could not be disclosed without breaching the prohibition. The consequence of breaching the prohibition could be a fine or even of term of imprisonment of up to two years. The Commissioner finds that for the purposes of FOIA the requested information is exempt from disclosure under section 44 of that Act. The Commissioner does not require Ofgem to take any further action.

Right of appeal

42. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

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