

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 October 2015

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

**Address:** 9 Millbank  
London  
SW1P 3GE

### Decision (including any steps ordered)

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1. The complainant has requested a supplier by supplier position on repayments to customers on calorific value (CV) miscalculations. Ofgem refused to provide the requested information, relying on section 44 of FOIA (prohibitions on disclosure) in order to do so. In particular Ofgem cited the statutory prohibition on disclosure created under the terms of Section 105 of the Utilities Act 2000.
2. The Commissioner's decision is that Ofgem has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

### Request and response

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3. On 19 June 2015 the complainant wrote to Ofgem and made a request for information in the following terms:

*'I have just read your statement about overcharging on cv. I wonder if you have a spread sheet you can share with me that shows the position across the suppliers the level of refunds overcharging untraced consumers etc. I am sure you know what I am asking for'*

4. Ofgem responded on 2 July 2015 and provided some information within the scope of the request but refused to provide the remainder. Ofgem explained that

*'We understand your request seeks information on outstanding occupier accounts to be refunded to live gas PPM customers. The information is commercially confidential at the level of detail you ask for; but to assist your request we have provided an approximation of the information we*

*have available at an aggregate level - as of April 2015 we understand that under 20k of occupier accounts were due to be refunded to live customers, but this number has likely reduced where suppliers have been able to trace the customers name (we do not hold information on the amount of refund due for these accounts).'*

5. On 2 July 2015, the complainant requested a review of the decision.
6. Ofgem provided an internal review on 29 July 2015 in which it maintained its original position. Ofgem cited section 44 of the FOIA on the basis of the prohibition from disclosure under the terms of Section 105 of the Utilities Act 2000.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 29 July 2015 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to determine whether Ofgem has correctly applied section 44(1)(a) to withhold the information.

### **Reasons for decision**

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#### *Section 44 prohibitions on disclosure*

9. Section 44(1)(a) of the FOIA states that:

*"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*

*(a) is prohibited by or under any enactment,"*

10. Ofgem considered that disclosure is prohibited by virtue of section 105(1) of the Utilities Act 2000 (the Act) which states:

*"105 General restrictions on disclosure of information.*

*(1)Information which—*

*(a) has been obtained under or by virtue of the provisions of this Act, Part I of the 1986 Act or Part I of the 1989 Act; and*

*(b) relates to the affairs of any individual or to any particular business,*

*shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on, except as provided below."*

11. Ofgem argued that section 105(1) applied because:
  - a) it obtained the information pursuant to one of the statutory functions (the relevant parts of the Gas and Electricity Acts ) covered by section 105(1)(a).
  - b) The information requested, namely a supplier-by-supplier position on repayments to customers on CV miscalculations, is held by Ofgem. This consists of baseline information that was obtained by the Gas and Electricity Markets Authority under section 34 of the Gas Act 1986 and comprises information which relates to the affairs of particular businesses.
  - c) Disclosure of that information would be a breach of Ofgem's statutory duty.
12. In addition Ofgem considered section 105(9) of the Utilities Act which provides that a person who discloses any information in contravention of the section is guilty of an offence, and liable to a fine or a prison sentence, or both.
13. However, section 105(2) of the Utilities Act refers to consent:

*(2) Subsection (1) does not apply to a disclosure made with the consent of the individual or the person for the time being carrying on the business.*
14. This would have allowed Ofgem to use the statutory gateway in section 105(2) of the Act to seek consent to disclose the requested information.
15. Ofgem have stated that 'we do not consider any of the gateways in section 105 to apply in this case.' During the Commissioner's investigation, Ofgem confirmed that they had not sought consent as from previous experience they would not have received full consent.
16. The Commissioner notes that these gateways do not compel Ofgem to disclose information but do allow it to disclose information for the purposes set out in these sections. In the *Dey* case (*Dey v ICO and OFT (EA/2006/0057)*) the Information Tribunal commented on the gateways and stated that "*it gives a power to disclose, not a duty*". The Commissioner therefore accepts that Ofgem has discretion as to whether or not to use the gateways to disclose specified information.
17. In this case Ofgem has stated it does not consider any of the gateways in section 105 to be applicable. Ofgem did not consider it was practical

to obtain consent (and was not obliged to do so) and did not accept that any of the other 'gateways' were applicable; the Commissioner therefore accepts that there was no obligation on Ofgem to seek consent to disclose the specified information.

18. In the Commissioner's view, the operation of the statutory bar in this case is dependent on the consideration of whether the information, ie the supplier by supplier position on repayments to customers on calorific value (CV) miscalculations was obtained pursuant to one of the statutory functions covered by section 105(1)(a).
19. Ofgem has explained that it obtained the information under section 34 of the Gas Act 1986 and comprises information which relates to the affairs of particular businesses.
20. Ofgem considered that as the FOIA does not override other laws that prevent disclosure, in light of the reasons set out in the above paragraphs its view was that section 105 of the Act remains a statutory bar. Therefore it considered that disclosure of the information was and continues to be prohibited under the Act, and the absolute exemption in section 44 of the FOIA applies to the information.
21. The Commissioner is satisfied that the withheld information directly relates to the affairs of a particular business i.e. the suppliers that provided the information.
22. The Commissioner therefore finds that Ofgem has correctly applied section 44(1)(a) to the withheld information.
23. As section 44 is an absolute exemption, there is no need to consider the public interest test. The Commissioner does not require Ofgem to take any further action.

## **Other Matters**

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24. The Commissioner reminds Ofgem that he is entitled to view all the withheld information as part of his investigation.
25. Schedule 2, paragraph 18 of FOIA amended section 58 of the Data Protection Act (DPA) so that section 58 of the DPA now read as follows:  
  
"No enactment or rule of law prohibiting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of functions under this Act or the Freedom of Information Act 2000."

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**