

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 11 November 2021

Public Authority: Office of Gas and Electricity Markets (Ofgem)
Address: 10 South Colonnade
Canary Wharf
London
E14 4PU

Decision (including any steps ordered)

1. The complainant requested details underlying the consideration of enforcement action against a particular energy company. The Office of Gas and Electricity Markets ("Ofgem") provided some information but relied on Regulation 12(4)(e) (internal communications) and Regulation 12(5)(b) (course of justice) of the EIR to withhold the remainder.
2. The Commissioner's decision is that Ofgem is entitled to rely on Regulation 12(5)(b) and that the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

Request and response

4. On 7 August 2020, the complainant wrote to Ofgem as part of a broader concern his company ("the Company") had about a potential breach of licensing conditions in relation to Smart Meter Obligations. In the course of that correspondence, he also requested information in the following terms:

"1. the number of suppliers who Ofgem believe not to have achieved their 2019 milestones;

- "2. out of these suppliers, how many are being treated in a similar way by Ofgem to [the Company], and*
- "3. of the large suppliers who Ofgem believes did not achieve their milestones, and*
- "4. if Ofgem is not treating these suppliers in a similar way to [the Company], an explanation of the grounds on which those decisions have been taken and how their situations differ from those of [the Company]"*
5. Ofgem responded on 4 September 2020. It provided information within the scope of elements 2 and 4, but withheld the remaining information. It relied on Regulations 12(4)(e) and 12(5)(b) of the EIR in order to do so.
6. Following an internal review Ofgem wrote to the complainant on 23 December 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 March 2021 to complain about the way his request for information had been handled.
8. Ofgem confirmed to the Commissioner that it wished to maintain that both exceptions applied to the entirety of the withheld information. Having considered Ofgem's submission, the Commissioner considers it likely that Regulation 12(4)(e) is engaged. However, given that Ofgem's public interest arguments for maintaining that exception rely in large part on the fact that the particular internal communications relate to the possibility of enforcement action, the Commissioner considers that the Regulation 12(5)(b) exception should be the logical starting point of her analysis. If Ofgem is unable to demonstrate that disclosure would adversely affect its ability to consider or pursue enforcement action, it is unlikely to be able to demonstrate the need for a safe space to discuss such matters internally.
9. The Commissioner considers that the scope of her investigation is to determine whether Ofgem is entitled to rely on Regulation 12(5)(b) to withhold the requested information. If it is not, she will then consider whether it might instead rely on Regulation 12(4)(e).

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
11. The Smart Meter programme is famously a "measure" affecting the elements of the environment: that was the verdict of the Court of Appeal in *BEIS v Information Commissioner and Henney* [2017] EWCA Civ 844. The requested information is clearly "on" the programme and measures taken to ensure its success. The Commissioner is therefore satisfied that this information is environmental information and thus falls to be dealt with under the EIR.

Regulation 12(5)(b) – course of justice

12. Regulation 12(5)(b) states that:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."

13. The Commissioner's published guidance explains that this exception is broad and may encompass a wide variety of judicial or quasi-judicial processes that a public authority may conduct or be involved in.¹

14. Ofgem explained that it has powers under the Electricity Act 1989 and the Gas Act 1986 to investigate whether particular gas or electricity providers are complying with the Standard Licensing Conditions of their gas or electricity supply licence.

15. In this particular case, Ofgem wished to establish whether several energy providers had failed to discharge their obligations in respect of Smart Meters. Each provider must produce a roll-out plan demonstrating how it intends to increase the proportion of its customers who have Smart Meters. The roll-out plan must also set annual milestones which the provider is then required to meet. If it does not, Ofgem then has the power to impose a sanction upon the company.

16. The withheld information in this case comprises of materials generated by Ofgem in order to assess the compliance of various energy providers against the annual milestones they had set themselves and to determine whether any sanctions were appropriate for those providers who had failed to meet their targets.

17. The Commissioner is thus satisfied that Ofgem is carrying out an investigation in accordance with its statutory functions.

18. Ofgem considered that disclosure of the withheld information would:

¹ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

"not only adversely affect the course of the ongoing investigation process through the disclosure of gathered evidence before the investigation has concluded, but it may also undermine public confidence in the inquiry/investigation process itself. The information requested relates to a live and ongoing inquiry into [the Company]'s compliance with the Smart Meter Obligations. It is clear that the public disclosure of such information would not only inhibit the Authority's ability to effectively conduct an investigation, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties."

19. Ofgem went on to explain that:

"The disclosure of the information would have an adverse effect on the Authority's investigation into [the Company]'s compliance with the Smart Meter Obligations because it would have no "safe space" in which to consider enforcement. The disclosure of the requested information would mean the release of irrelevant information to the investigation and distract Ofgem from the enforcement of the matter at hand. Also a similar adverse affect would occur: disclosure could mean that Ofgem would receive representations on its internally agreed position from interested parties, ranging from the rest of the energy market through to individuals with strongly held views on the matter. Those representations would be voluminous and interrupt and distract the Ofgem and the EOB from making an appropriate determination of whether to take enforcement action in this and future cases. Opening EOB papers and discussion to public scrutiny would fundamentally undermine the ability of the EOB to make determinations without the distraction of external influences from other licensees or individuals."

20. Ofgem was also concerned that disclosure of the withheld information would reveal the more detailed information about the threshold level at which it would initiate enforcement action. Revealing such information would, Ofgem argued, encourage providers to do the "bare minimum" needed to avoid enforcement action, rather than striving to meet the target.

21. Finally, it noted that:

"In addition, disclosure of the requested information would prejudice the Authority's ability to gather the facts and/or evidence in future investigations. Information on relative performance was requested by the Authority from licensees using its "monitoring" statutory powers to request information. A person who intentionally

alters, suppresses or destroys any document or record of information which that person has been required to produce is liable to a criminal conviction. Notwithstanding the threat of criminal conviction for the alteration, suppression or destruction of documentation there is the potential for obstruction or deliberate obfuscation by licensees should they wish to evade providing true reports to Ofgem. Ofgem relies on establishing and maintaining good relationships with licensees in order to secure high quality information and evidence. Releasing the requested information would discourage other licensees from responding in the open and transparent way that Ofgem is accustomed to. Licensees, aware that the material is to be published, may seek to massage information to present that information in the best possible light for publication. This would result in greater resource requirements for Ofgem in dealing with the subsequent clarifications needed to remove those obfuscations. If such information is released applicants will be less likely to engage openly with Ofgem in relation to future information monitoring requests."

The Commissioner's view

22. The Commissioner accepts that disclosure of this information would adversely affect Ofgem's ability to conduct both this investigation and further investigations.
23. As a general rule, the Commissioner considers that the chances of an adverse effect are always greatest when an investigation or inquiry is ongoing – as is the case here. A public authority is entitled to its own private thinking space in which to gather evidence, consider and weigh competing arguments, before it decides whether some form of enforcement is justified.
24. In the current instance, the Commissioner accepts that the full enforcement process was ongoing at the point the request was made and that Ofgem continues to carry out investigative work on this matter. Therefore the investigation remains very much "live" with no final decision on enforcement having been made.
25. The Commissioner accepts that disclosure at this stage would have an adverse effect on Ofgem's ability to pursue this investigation and to carry out future investigations. Parties that are under investigation will be much less likely to provide open and candid responses if they consider that those responses will subsequently be placed into the public domain. Whilst Ofgem does have formal powers to require information to be provided, this often slows down the process of investigation.

26. Furthermore, Ofgem has been very clear that the fact that the Company is the subject of an investigation should not be taken as implying at the Company has (or has not) failed to comply with its licence conditions. Revealing Ofgem's early internal thinking, prior to the conclusion of an investigation, would risk unfair reputational damage if the Company were to be "judged in the court of public opinion" prior to Ofgem having delivered its considered judgment. Disclosure under the EIR is disclosure to the world at large – not just to the Company.
27. Disclosure of early thinking also risks giving the impression that the outcome of the investigation is pre-determined, thus undermining its independence. Providers will be less likely to engage with Ofgem in future if they do not consider that an investigation is both independent and impartial. That in turn affects Ofgem's ability to discharge its statutory functions relating to enforcement.
28. Whilst the Commissioner considers that the bar of "would adversely affect" implies that any adverse effect is more likely than not to occur, in the circumstances of this case, she is satisfied that disclosure of the withheld information would adversely affect Ofgem's ability to conduct a statutory investigation. She is therefore satisfied that Regulation 12(5)(b) is engaged and has gone on to consider the public interest test.

Public interest test

29. Even where disclosure would have an adverse effect, environmental information must still be disclosed unless the balance of the public interest favours maintaining the exception.
30. Having found that disclosure would adversely affect the course of justice, the Commissioner is required to give inherent weight to the public interest in preventing that from happening – but she must also consider whether there are sufficiently strong grounds for disclosure.
31. The complainant considered that there was a strong public interest in disclosure because:

"There is a lack of transparency over how Ofgem assessed the other half of all large suppliers allegedly in breach of their 2019 milestones obligation. As matters stand, [the Company] simply does not know what it is that differentiates it from some, or the majority of, other suppliers allegedly in breach, and against whom no enforcement action is being taken. There is a public interest in Ofgem's enforcement decision-making being transparent and understandable. Refusing to disclose the basis of its enforcement decision making, without adequate justification, undermines the

public confidence that this key sectoral regulator is taking decisions in a rational and fair way.

"There is a public interest in suppliers being treated fairly by Ofgem, to ensure there is confidence in the regulatory regime. Loss of confidence in the regulator may inhibit suppliers' entry to and investment in the energy supply market more generally, which could harm consumers' interest overall."

32. In explaining why the public interest should favour maintaining the exception, Ofgem pointed to the adverse effects that disclosure might have and the strong public interest in preventing such effects.
33. Having considered the matter, the Commissioner is satisfied that, certainly at the point the request was made and for as long as the investigation remains live, the balance of the public interest favours maintaining the exception. There is a strong public interest in a public authority, which has regulatory powers relevant to the environment, being able to exercise those powers effectively and fairly.
34. In terms of transparency and being seen to be fair, the Commissioner notes that Ofgem published an open letter, in June 2020, which set out its broad approach to assessing compliance.²
35. Whilst the Commissioner recognises that there is a strong public interest in public authorities which carry out regulatory functions setting out their strategic approach to regulation, there is often also a strong interest in not allowing the precise tactical options they intend to use to be fully defined.
36. Ofgem has explained that each provider has set its own annual milestones that it must meet in order to fulfil the licence conditions. Each provider should therefore be focused on meeting those milestones and there is a public interest in ensuring that they do. The fact that the regulator has need to impose this framework implies that those milestones would not be met (or at least not met as quickly) if the market were left to regulate itself.
37. Disclosure of the withheld information would, in the Commissioner's view, reveal more closely the exact criteria that Ofgem uses to determine when it will or will not consider enforcement action. If

² <https://www.ofgem.gov.uk/publications/smart-meter-rollout-energy-suppliers-progress-and-future-plans-open-letter-june-2020>

providers know the bare minimum they need to achieve to avoid enforcement then, all other things being equal, that bare minimum will become the new target – rather than the milestones that the providers have set themselves. That will affect the overall implementation of the Smart Meter programme and Ofgem's ability to ensure that the programme is delivered as efficiently as possible.

38. If the company is concerned that Ofgem's final enforcement decision is unfair, it will have the right to challenge that decision in court. That right ensures fairness in the process without the need to undermine Ofgem's work.
39. Having taken this into account as well as the very strong public interest in allowing Ofgem to carry out its investigative function properly, the Commissioner is satisfied that the balance of the public interest favours maintaining this exception.
40. The Commissioner has also had regard to the EIR's presumption in favour of disclosure. However, she considers that the public interest is not evenly balanced and therefore the presumption in favour of disclosure does not alter her judgment.
41. The Commissioner is therefore satisfied that Ofgem is entitled to rely on Regulation 12(5)(b) to withhold this information. As such there is no need for her to consider any other exception.

Other matters

42. Whilst the Commissioner notes that Ofgem's refusal notice did specify both of the exceptions it was relying on to withhold information, Ofgem could have provided more detail about why each exception applied – instead of merely stating the text of each exception.
43. The Commissioner considers it good practice for a public authority to not just state the exceptions it is relying on, but to explain why those exceptions apply to the particular information that has been requested.
44. This is especially important where a public authority is relying on a claim that disclosure would have one or more of the adverse effects listed in Regulation 12(5) of the EIR. A public authority should be able to explain why any adverse effect would occur.
45. The Commissioner would note that, not only is a well-explained refusal notice less likely to lead to an internal review and complaint, but she is more easily able to dispose of complaints where the public authority has already justified its position clearly.

Right of appeal

46. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

47. 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.
48. 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

Roger Cawthorne
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