

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 February 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information about the use of "PACE powers." The Office of Gas and Electricity Markets ("Ofgem") relied on section 21 of FOIA to withhold the requested information as it was already reasonably accessible to the requestor.
2. The Commissioner's decision is that Ofgem is entitled to rely on section 21 of FOIA to withhold the requested information and, on the balance of probabilities, holds no further information within the scope of the request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 1 April 2021, the complainant wrote to Ofgem and requested information in the following terms:
  - "1. From which Authority does OFGEM get their devolved PACE (powers)?
  2. Has OFGEM received any devolved PACE Powers from the Metropolitan Police or College of Policing?
  3. Which Authority is ultimately responsible to ensure that PACE powers has been practised and upheld so that members of the public are protected when crimes have been blatantly committed?

4. If this PACE devolved organisation (I.e. OFGEM) continually refuse to uphold their duty to protect a citizen from harm and crime, which Higher Authority do we go to?"
5. Ofgem responded on 20 April 2021. It stated that the information the complainant had requested was already reasonably accessible to her and it was therefore relying on section 21 of the FOIA to withhold it. However, it also pointed the complainant to its published Enforcement Guidelines and Prosecution Policy Statement
6. Following an internal review Ofgem wrote to the complainant on 25 May 2021. It upheld its original position

### **Scope of the case**

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7. The complainant first contacted the Commissioner on 11 August 2021 to complain that Ofgem had failed to respond to her request. Once it had been established that the complainant had exhausted Ofgem's internal review process, the Commissioner accepted the complaint for further review.
8. On 20 January 2022, the Commissioner wrote to the complainant to offer his preliminary view of her complaint. The Commissioner explained that, having considered the information Ofgem had highlighted, it was his preliminary view that the highlighted information set out Ofgem's powers of criminal investigation and the legislation from which those powers were derived. As this information was self-evidently freely available online, it was difficult to see why it was not reasonably accessible to the complainant.
9. The complainant did not accept the Commissioner's preliminary view. She did not consider that the information in the public domain answered her questions. She was also unhappy that the Commissioner had not "clarified" her complaint, that he had failed to investigate "crimes", not properly considered the evidence she had provided and not given her the opportunity to provide further evidence.
10. For the avoidance of doubt, the Commissioner notes that he did consider whether a criminal offence, under section 77 of FOIA, had been committed but did not consider that the evidence provided demonstrated any deliberate intent, on behalf of Ofgem, to withhold information outside of the usual process of applying exemptions. The Commissioner also wishes to confirm that he has considered all the evidence provided by the complainant – insofar as it was relevant to the matters set out in this notice.

11. He also notes that it is the responsibility of the person making the complaint to provide all relevant evidence at the outset of the investigation. The complainant has not identified the evidence she believes the Commissioner ought to have considered, however, for reasons that will be expanded upon below, the Commissioner is sceptical that this evidence would have been relevant to his investigation, let alone have altered his decision.
12. As the complainant does not appear to have challenged the accessibility of the information – only its relevance to her request - the Commissioner considers that the scope of his investigation is to determine whether Ofgem holds any further information within the scope of the request.
13. As the matters involved are straightforward, the Commissioner did not seek a formal submission, but he did ask Ofgem if there was anything it wished to add to its previous responses – there was not.

## **Reasons for decision**

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### **Section 1 (Held/Not Held)**

14. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.
15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
  16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

17. The Police and Criminal Evidence Act 1984, often known by the abbreviation "PACE," sets out the powers available to police officers in order that they can enforce the law and investigate potential crimes. It also sets out the limits on those powers and the requirements of evidence-gathering. PACE (as the name suggests) applies mainly to the police, but some of its statutory provisions also apply to officers of HMRC and to parts of the Armed Forces.
18. Section VI of PACE places a duty upon the Secretary of State to issue various Codes of Practice concerning the use of the various powers listed in the Act.
19. A wide variety of organisations, besides the police, have the power to carry out criminal investigations. Even though their authority to carry out such investigations does not come from PACE, those organisations are usually still required to follow the PACE Codes of Practice when it comes to gathering evidence as, if they fail to do so, evidence may be ruled as inadmissible in the event that the case goes to court.

### **The complainant's position**

20. The complainant argued that the information that Ofgem provided did not answer her question as it did not cite specific "PACE powers" that Ofgem had or set out the procedure for challenging Ofgem's use of those powers.
21. She argued that various bodies she had written to had all "confirmed that Ofgem holds no PACE membership" and provided copies of correspondence she had had with those bodies.
22. The complainant also explained that she had been in a dispute with an electricity distributor which had resulted in her property having its mains electricity disconnected. She argued that this disconnection was not just unlawful but criminal and that Ofgem ought to have carried out a criminal investigation but did not.

### **The Commissioner's view**

23. The Commissioner considers that Ofgem has identified the information it holds within the scope of the request.
24. The request clearly comes against the backdrop of the criminal investigation the complainant feels that Ofgem ought to have carried out.
25. It has, at times, been unclear from the correspondence whether the complainant genuinely believes that Ofgem does hold relevant information, genuinely believes that it does not hold the information, or is uncertain either way. The Commissioner has proceeded on the basis

of the latter position, but notes that a person making a request for information they know not to be held might be considered to be abusing the FOIA process.

26. The PACE Act is in the public domain and it is therefore easy to see which bodies the Act grants specific powers to. It is not a membership club. It delegates specific powers to specific bodies – all of which is set out in the body of the Act. This information is reasonably accessible to the complainant.
27. As the Commissioner has noted above, PACE is not an exhaustive list of the bodies with powers to carry out criminal investigations. Other bodies derive their investigatory powers from other pieces of legislation – however, they are usually still subject to the PACE Codes of Practice when it comes to gathering evidence and dealing with witnesses or suspects. These might be considered to be “PACE-equivalent powers” as they mirror some of the powers in PACE and must be exercised in accordance with PACE Codes of Practice but they are not powers derived from PACE itself.
28. The Prosecution Policy Statement that Ofgem has drawn the complainant’s attention states that Ofgem has powers of criminal investigation. The Statement also sets out the raft of legislation from which these powers derive: particularly the Gas Act 1986, the Electricity Act 1989 and the Electricity and Gas (Market Integrity and Transparency)(Criminal Sanctions) Regulations 2013 and 2015. These pieces of legislation grant Ofgem some of the same powers granted to the Police by PACE – including the power to seek search warrants and the power to compel the production of information. However, not all the powers available via PACE are available to Ofgem – for example, as the Statement notes, Ofgem does not have the power of arrest. All these pieces of legislation are in the public domain – as is the Statement itself.
29. Therefore the Commissioner considers that the information Ofgem has drawn the complainant’s attention to sets out clearly the powers it has and where those powers come from. The complainant is also able to compare Ofgem’s powers to those outlined in PACE using information in the public domain.
30. Where a public authority launches a criminal investigation, if it fails to adhere to the standards set out in legislation or in the PACE Code of Practice, any failings can be probed in court. Decisions that a public authority takes can also be susceptible to judicial review. Once again, this is information in the public domain and the Commissioner notes that part of the correspondence the complainant submitted states that she is able to seek a judicial review if she wishes. Complaints about Ofgem can

be referred to the Parliamentary and Health Services Ombudsman. Once again, this is information that is in the public domain.<sup>1</sup>

31. FOIA concerns the right of access to recorded information from public authorities. It does not require public authorities to create bespoke answers to questions that have been posed – they must simply identify the relevant information that they hold in recorded form.
32. Ofgem has drawn the complainant's attention to information setting out the legislative basis for its criminal investigations and explaining its own internal guidelines for exercising these powers. The various pieces of legislation are all published, as is Ofgem's own internal complaints process and the process for escalating complaints beyond Ofgem.
33. The Commissioner therefore considers that, whilst Ofgem may not have responded to the complainant's questions in the manner that she wanted it to, it has nevertheless drawn her attention to the recorded information that is available in the public domain.
34. The correspondence that the complainant has drawn to the Commissioner's attention gives no definitive indication that Ofgem does or does not hold relevant information. The various bodies with which the complainant has corresponded merely confirm that they do not oversee Ofgem. The exception was DBEIS, which did refer to "PACE powers", however the context of the letter suggests that its author was merely mirroring the language used by the complainant. Given the clear wording of the relevant legislation, the Commissioner does not consider that this correspondence alters his conclusion.
35. The Commissioner is therefore satisfied that Ofgem has identified the information it holds within the scope of the request. As this information is reasonably accessible to the complainant, Ofgem is not obliged to communicate it to her.

### **Procedural Matters**

36. In her correspondence to the Commissioner of 24 January 2022, the complainant challenged that Ofgem had responded to her request not just within 20 working days, but at all. She also challenged that Ofgem had provided her with the outcome of its internal review – although, even if this were the case, it would not have amounted to a statutory breach.

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<sup>1</sup> <https://www.ofgem.gov.uk/about-us/contact-us/complaining-about-ofgem>

37. Ofgem provided the Commissioner with copies of the covering emails to which its response and internal review were attached. The email address appears to be the same as that which the Commissioner has used to communicate with the complainant and nothing in the metadata suggests that the emails were not delivered to the complainant's email server.
38. The Commissioner is prepared to accept, in the absence of contrary evidence, that, for whatever reason, neither of these emails found their way into the complainant's inbox – possibly because of anti-spam measures on the complainant's computer or server. However, even if that is the case, it does not mean that Ofgem did not comply with its responsibilities. It issued a timely response and cannot be held responsible for any technical issues at the complainant's end.
39. On the balance of probabilities, the Commissioner is therefore satisfied that, in issuing its refusal notice within 20 working days, Ofgem complied with its FOIA obligations.

## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)

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

41. 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.
42. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**