

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2023

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

Decision (including any steps ordered)

1. The complainant requested information from the Office of Gas and Electricity Markets (Ofgem) relating to secondments to Ofgem.
2. The Commissioner's decision is that Ofgem is not entitled to rely on section 40(2) (personal information) or section 44 (prohibitions on disclosure) of the FOIA to refuse to provide the withheld information.
3. The Commissioner requires Ofgem to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
4. Ofgem must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information request to Ofgem on 5 September 2022:

"This is a request for information under the Environmental Information Regulations about secondments into your organisation.

1. Please state how many people are currently on an inward secondment. For each current inward secondment, please state:
 - a) civil service seniority level
 - b) job title
 - c) organisation seconded from
 - d) date commenced
2. Please state how many people have concluded an inward secondment since 01/01/2022. For each concluded inward secondment, please state:
 - a) civil service seniority level
 - b) job title
 - c) organisation seconded from
 - d) date concluded

Thank you for the time and energy you will invest in preparing a response to this request. I would prefer to receive all information in electronic format and in machine-readable formats where applicable. I would be grateful if you could acknowledge receipt of this request."

6. Ofgem responded on 28 September 2022 and provided the complainant with the number of people who are currently on an inward secondment and the number of people who have concluded an inward secondment since 1 January 2022. However, it refused to provide the remainder of the requested information citing section 40(2) (personal information) of the FOIA as its basis for doing so.

7. On 28 September 2022, the complainant requested an internal review. Ofgem provided the complainant with the outcome of its internal review on 14 October 2022 in which it maintained its position.
8. Ofgem provided the complainant with a further response to the request on 29 March 2023. It revised its position stating that it was now relying on both section 40(2) and section 44 (prohibitions on disclosure) of the FOIA to refuse to provide the withheld information.

Reasons for decision

9. This reasoning covers whether Ofgem is entitled to rely on section 40(2) and section 44 of FOIA to refuse to provide the withheld information.

Section 40(2) – personal information

10. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
11. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. In this case, Ofgem has withheld the seniority levels and job titles of individuals seconded to Ofgem. It has also withheld the name of the organisation that individuals have been seconded from and the dates that those individuals either started or finished their secondments.
14. The Commissioner has viewed the withheld information and is satisfied that the withheld information would identify the individuals who have been seconded to Ofgem as he considers that other employees at Ofgem would be able to identify the individuals who have been seconded from the withheld information. This is because the other employees would be able to link their existing knowledge of their colleagues with the withheld information. That existing knowledge may be of a combination of from which other department a colleague came from and the time frame of the secondment, for example. The Commissioner is also satisfied that the withheld information relates to the individuals who have been seconded to Ofgem and therefore, he considers the withheld information to fall within the definition of ‘personal data’ in section 3(2) of the DPA.

15. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

 "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
16. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
17. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
18. In this case, the Commissioner considers that the complainant is pursuing a legitimate interest as Ofgem is a publicly funded organisation and so there is a legitimate interest in understanding how Ofgem is using its funds, in this case, to second individuals from other organisations. The Commissioner also considers that disclosure of the withheld information is necessary to meet that interest.
19. Ofgem considers that the individuals who have been seconded to Ofgem have a reasonable expectation that information relating to their employment such as their job title and seniority level would not be disclosed to the public. It considers that disclosure of the withheld information would likely cause the individuals who have been seconded to Ofgem some distress as the information relates to their employment, particularly at a time of significant media attention focussed on the energy regulator. Ofgem considers that disclosure of the withheld information would enable the public to make assumptions about the financial status and lifestyle of the individuals who have been seconded.
20. The Commissioner recognises that disclosure of the withheld information would release information about the employment and financial status of individuals who have been seconded to Ofgem. However, he considers that as the individuals have been seconded to publicly funded roles, there should be some expectation that information relating to their employment may be disclosed. Furthermore, whilst the disclosure of jobs titles and seniority level would provide some limited indication of the financial status of the secondees, the exact salary of each individual has not been requested and so disclosure of the withheld information is unlikely to cause significant distress to the individuals.

21. The Commissioner considers that the legitimate interest identified above outweighs the fundamental rights and freedoms of the individuals who have been seconded to Ofgem. Therefore, his decision is that Ofgem is not entitled to rely on section 40(2) of the FOIA to refuse to provide the withheld information.
22. He will now go on to consider whether Ofgem is entitled to rely on section 44 of the FOIA to refuse to provide the withheld information.

Section 44 – prohibitions on disclosure

23. Section 44(1)(a) of the FOIA states that information is exempt from disclosure if its disclosure, otherwise than under FOIA, is prohibited by or under any enactment.
24. Ofgem considers that disclosure of the withheld information is prohibited under section 105(1) of the Utilities Act 2000 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."
25. In its submissions to the Commissioner, Ofgem stated that section 105(1) of the Utilities Act 2000 applies because the withheld information was obtained pursuant to one of Ofgem statutory functions covered by section 105(1)(a) of the Utilities Act 2000. It also considers the withheld information to relate to the affairs of an individual as the information relates to the individuals who have been seconded to Ofgem.
26. The Commissioner understands that information held by Ofgem is exempt from disclosure under section 105 of the Utilities Act 2000 if that information was obtained by Ofgem for the purposes of fulfilling its statutory functions. As the withheld information relates to a staffing matter rather than more directly to Ofgem's regulatory role, the Commissioner does not consider the withheld information to relate to Ofgem's statutory functions. He therefore does not consider section 105 of the Utilities Act 2000 to apply to the withheld information.
27. As section 105 of the Utilities Act 2000 does not apply to the withheld information, the Commissioner's decision is that Ofgem is not entitled to

rely on section 44 of the FOIA to refuse to provide the withheld information.

Right of appeal

28. 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

29. 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.
30. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF