

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2024

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

Address: 10 South Colonnade
Canary Wharf
London
E14 4PU

Decision (including any steps ordered)

1. The complainant has requested details of requests for information made to energy suppliers to check they are meeting requirements of the Gas Supply Licence. The Office of Gas and Electricity Markets ('Ofgem') applied section 44 of FOIA (prohibitions on disclosure) to refuse the first two parts of the request and advised it did not hold the information requested in the third part of the request.
2. The Commissioner's decision is that Ofgem is entitled to withhold the information requested in parts one and two of the request under section 44(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 16 December 2023, the complainant wrote to Ofgem and requested information in the following terms:

"Please provide the following recorded information of Ofgem, subject to the exclusions below.

1. Showing the content of any requests for information Ofgem has made in the period since 1 January 2022 to energy suppliers generally (i.e. not limited to one or more specific suppliers) to verify if the

supplier has ensured that it achieves each of the Standards of Conduct of Gas Supply Licence as set out in Condition 0.3 c).

2. Showing the content of any requests for information Ofgem has made in the period since 1 January 2022 to one or more specific energy suppliers to verify if the supplier has ensured that it achieves each of the Standards of Conduct of Gas Supply Licence as set out in Condition 0.3 c).

3. Showing any basis for asserting that any energy supplier must keep either type of request for information confidential.

For the purpose of stating whether Ofgem holds responsive information, please treat each request 1 - 3 above as a separate request.

Exclusions: Any recorded information that might reveal either information provided to Ofgem or the identity of an individual energy supplier is excluded from this request."

5. On 18 December 2023, the complainant provided the following clarification

"I wish to refine and clarify the "Exclusions" from my 16 December request. The Exclusion should now be read as:

"Exclusions: Any recorded information that is subject to an exemption under section 44 FOIA, or that would identify an individual energy supplier, is excluded from this request.""

6. Ofgem responded on 10 January 2024. For parts one and two of the request, it confirmed that it held the requested information but advised that it was exempt under section 44 of FOIA. For part three, Ofgem advised that it:

"...does not hold information as to why individual suppliers would like to keep any request for information confidential. As the information you have requested relates to the affairs of third-party businesses, they will have their own policies on information that can be released. Ofgem does not have any control over any process and policies that may exist for this purpose."

7. The complainant wrote to Ofgem on 11 January 2024 to express dissatisfaction with the application of section 44 of FOIA and to advise that Ofgem had misinterpreted the third part of their request.

8. Following an internal review Ofgem wrote to the complainant on 31 January 2024, upheld its reliance on section 44 of FOIA and confirmed it did not hold information relating to the third part of the request.

Scope of the case

9. The complainant contacted the Commissioner on 5 February 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to look at whether Ofgem is entitled to rely on section 44 of FOIA as a basis for refusing to provide the withheld information for parts one and two of the request.
11. As the complainant has not expressed dissatisfaction that information is not held for the third part of the request, the Commissioner has not considered whether information is held. However, the Commissioner has addressed the complainant's dissatisfaction with Ofgem's initial misinterpretation of this part of the request in the 'Other Matters' section of this notice.

Reasons for decision

Section 44 of FOIA – prohibitions on disclosure

12. Section 44(1)(a) of FOIA says that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption and isn't subject to the public interest test.
13. In its response to the request, Ofgem advised the complainant that section 105(1) of the Utilities Act 2000 prohibited it from disclosing the information requested in parts one and two of the request.
14. Section 105 of the Utilities Act says that information which has been obtained under or by virtue of the Act and relates to the affairs of any individual or any particular business shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on. As such, section 44(1) applied.
15. In their request for an internal review, the complainant argued that their request asked for information about the content of requests made by Ofgem and in contrast section 105 of the Utilities Act relates to information that "has been obtained" by Ofgem.

16. Ofgem has explained that, when sending requests for information to licenced energy suppliers about compliance with the conditions of the Gas Supply Licence, it asks questions that are generally based on information that Ofgem has obtained, pursuant to its functions under the Gas Act, about the supplier businesses concerned. As a result, questions asked will include information about the business or will seek additional information from licenced suppliers in reference to information that is already held by Ofgem about the business.
17. Ofgem was formed under the Utilities Act and performs functions under the Electricity Act, Gas Act and various legislation. It's entitled to withhold any information that comes into its possession for the purposes of performing its regulatory functions listed under section 105(1)(a) of the Utilities Act.
18. The Commissioner has viewed a sample of the withheld information and noted that the requests for information refer back to information about suppliers already obtained by Ofgem and relates to the business of suppliers. He is therefore satisfied that Ofgem holds the information the complainant has requested by virtue of its statutory functions.
19. The Utilities Act 2000 provides gateways for lawful disclosure, but the Commissioner doesn't consider that any of these gateways have been met. In any case, these gateways provide a power to disclose, not a duty to disclose.
20. The Commissioner's decision is that Ofgem correctly applied section 44(1) of FOIA to withhold the requested information in parts one and two of the request because the Utilities Act prohibits Ofgem from disclosing it.

Other matters

21. The complainant has expressed dissatisfaction that Ofgem initially misinterpreted the third part of their request and has asked the Commissioner to decide if there has been a breach of section 10 and section 1 of FOIA. The Commissioner considers that Ofgem's initial reading of, and response to, this part of the request was reasonable.
22. As Ofgem provided an initial response within 20 working days and then confirmed its response of "information not held" for part three remained unchanged at internal review, the Commissioner does not find it necessary to record a breach of section 10 and section 1 of FOIA in this case.

Right of appeal

23. 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

24. 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.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF