

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2019

Public Authority: Office of Gas and Electricity Markets (Ofgem)
Address: 9 Millbank
London
SW1P 3GE

Decision (including any steps ordered)

1. The complainant has requested information relating to Consumer Dispute Resolution Limited (CDRL's) application to Ofgem to provide Alternative Dispute Resolution (ADR) services for consumer complaints.
2. The Commissioner's decision is that Ofgem has correctly applied section 44(1)(a) of the FOIA to the withheld information.
3. The Commissioner does not require Ofgem to take any steps as a result of this decision notice.

Request and response

4. On 28 March 2018, the complainant wrote to Ofgem and requested information in the following terms:

Copies of all correspondence with CDRL regarding the application for approval to be approved by OFGEM to provide ADR. This to include the initial request and further correspondence.

Copies of all responses to the consultation regarding CDRL's application to be approved.

5. Ofgem responded on 30 April 2018 and provided some information in response to part 1 of the request. It stated that the information was redacted by virtue of section 40(2) to remove personal data. It also stated that further information was redacted by virtue of section 44. Finally it explained that the remaining elements of the documents

related to information already publicly available, for example, in the narrative in its open letter and decision. On this basis they were exempt by virtue of section 21.

6. In response to part 2 of the request, Ofgem refused to provide any information again citing section 44 of the FOIA.
7. In her request for review the complainant stated:

1) Correspondence with CDRL

I have requested similar information regarding all correspondence between CDRL and BEIS and CTSI and I received all the correspondence. Names were redacted. The correspondence between two businesses should not include any personal information other than names which can be redacted. The correspondence regards the regulation of a business. There has been a lot of publicity and research into the regulation of ADR schemes both in the non-regulated and regulated areas/CDRL is an organisation that has been particularly criticised. The business affairs exemption is designed to protect information about the economy of the United Kingdom, where to disclose such information, would or would be likely, to prejudice the economic or financial interests of the United Kingdom or any part of it. Or that formation which if disclosed, it considers would, or would be likely to, prejudice its commercial interests. If there is information of this nature it raises the question why Ofgem continued with the consultation until CDRL withdrew its application. As ADR schemes are open to all consumers it is in the public interest for this information to become available. I also believe that it is in the public interest to see how a regulatory body undertakes due diligence.

2) Responses to the consultation

Individuals and organisations responded to the consultation in the knowledge that it would be made public unless they explicitly said that it was to remain confidential. I am in possession of some individual and organisation responses, so it is not confidential and I do not believe that Ofgem should withhold information that was freely given in the knowledge that it would be made public. I, however, should not have to guess who responded and contact them directly as Ofgem holds this information and I would not know who or what organisations responded.

8. Ofgem provided an internal review on 13 June 2018 in which it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 19 June 2018 to complain about the way her request for information had been handled. In her correspondence to the Commissioner she stated:

"My reasons in the Internal review request still stand.

In addition, the letter from CDRL to Ofgem is in the public domain. I have seen many of the consultation responses. Where names have been mentioned they refer to the Chief Ombudsman and to facts that have been given in other published documents such as Ombudsman Omnishambles, More Ombudsman Omnishambles and in the media. The Independent and Which?

The information that should be made available relates to one business. The consultation was public. Those giving a response, unless they said otherwise were happy for their responses to be made public. There is every chance that any of these organisations may put their response in full on their own websites. It is therefore nonsense to say that it cannot be made public. Any individual's names can be redacted.

Emails and the letter should have been found in the first stage of the FOI. I am aware of a letter from CDRL which was made public in email circulation, it is not acceptable that this wasn't "found" in the first stage. Likewise, it would be expected that there would be correspondence between an organisation applying to be approved by OFGEM it stuns me that 3 emails and a letter were not discovered in the FOI.

Given the criticism already in the public domain, it is in the public interest to see highly respected and experienced organisations and individuals who work in ADR, views on approval by Ofgem."

10. The Commissioner considers the scope of this case to be to determine if Ofgem has correctly applied either of the exemptions it has cited. The Commissioner notes that the complainant is not requesting any individual names that may fall under section 40(2).

Legislative background

11. Ofgem explained that references to the Authority and Ofgem are used interchangeably.
12. The Authority was established by the Utilities Act 2000 ("**Utilities Act**"), and the Authority's functions, powers and duties are largely provided for

in statute (such as the Gas Act 1986 ("**Gas Act**"), the Electricity Act 1989 ("**Electricity Act**"), the Utilities Act, the Competition Act 1998, the Enterprise Act 2002 and the Energy Acts of 2004, 2008, 2010 and 2011) as well as arising from directly effective European Community legislation. Alongside these, the Authority has a duty under the Consumer, Estate Agents and Redress Act 2007 ("**CEARA**") to make decisions to approve providers of Ombudsman services in the energy sector. Further, the Authority has powers under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015¹ ("**ADR Regulations**") to approve providers of alternative dispute resolution ("**ADR**") services in the energy sector. The ADR Regulations implement the EU Directive on Consumer ADR² ("**ADR Directive**").

Background

13. Ofgem explained that in March 2017, it received an application for certification to provide Ombudsman services under CEARA, and to provide ADR services under the ADR Directive. The applicant was Utilities ADR, which is owned by Consumer Dispute Resolution Limited ("CDRL").
14. As mentioned above, Ofgem has a formal role in receiving and approving applications from organisations wishing to become ADR providers in the Great Britain energy sector. Accordingly, it has published a document setting out what it expects an energy redress scheme and/or ADR service provider to fulfil³. Ofgem processes any applications under this regime in accordance with the criteria outlined in that published document.
15. Between March 2017 and March 2018, Ofgem corresponded with CDRL about Utilities ADR's application. In the process of assessing the merits of the application, Ofgem requested and received information about the company, which includes an application pack, information about the

¹ http://www.legislation.gov.uk/ukxi/2015/542/pdfs/ukxi_20150542_en.pdf and http://www.legislation.gov.uk/ukxi/2015/1392/pdfs/ukxi_20151392_en.pdf

² Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC

³

https://www.ofgem.gov.uk/sites/default/files/docs/2015/08/approval_criteria_for_redress_schemes_in_the_energy_sector.pdf

company, annual reports, business plans, articles of association and governance structure, among other things.

16. Ofgem identified various issues in having multiple ADR providers in the energy market. As such, it decided to consult interested parties in the form of an open letter on 22 January. The letter itself is published on its website⁴.
17. Following Ofgem's open letter, it considered the responses received and published its decision on the application by Utilities ADR on 21 March 2018⁵.
18. In its decision, Ofgem stated that in its response to the open letter, CDRL indicated, in a development to previous correspondence, that Utilities ADR sought certification under the ADR Directive to cover non-regulated energy complaints only. Ofgem's understanding of the ADR Regulations is that the Authority only has the ability to certify an ADR scheme in respect of the area covered by its regulatory responsibility (i.e. "regulated" energy complaints). For this reason Ofgem did not consider that it was legally empowered to provide the certification in the way it was requested by Utilities ADR. Ofgem therefore indicated its intention to no longer consider the application further.
19. In its open letter, Ofgem indicated that it would publish non-confidential responses to the consultation exercise. Having reviewed the responses received, Ofgem took the decision to publish a summary of responses⁶.
20. The published summary of responses states that 24 responses were received, however 25 responses were received and all responses were considered for the purposes of the application. Ofgem explained that for the avoidance of doubt, the conclusions made at the time about the suitability of the responses for publication were made in the context of considering its duties in terms of a suitable response to the consultation exercise.
21. The summary of responses was published on 15 June 2018, which was after Ofgem responded to the original FOI request and also after the internal review.

⁴ https://www.ofgem.gov.uk/system/files/docs/2018/01/open_letter-adr_-jan2018_0.pdf

⁵ <https://www.ofgem.gov.uk/publications-and-updates/application->

⁶ https://www.ofgem.gov.uk/system/files/docs/2018/06/ofgem_adr_open_letter_22_january_18_response_summary.pdf

Reasons for decision

Section 44 - prohibitions on disclosure

22. 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,"

23. 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."

24. Ofgem explained that the enactment in question and the specific provisions of that enactment on which it relies are section 105(1)(a) and (b) of the Utilities Act, which covers information obtained under or by virtue of the relevant parts of the Gas and Electricity Acts (or other specified legislation) and relating to the affairs of any individual, or to any particular business, during the lifetime of the individual or so long as the business continues to be carried on.

25. The exact text of section 105(1) is as follows:

Section 105 Utilities Act 2000 - 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 [Part 1 of the 1989 Act], section 184(5) or 185(5) of the Energy Act 2004 [or Part 2 or section 27 or 28 of the Energy Act 2010] [or section 50 or 51 of the Energy Act 2013] or section 41 or 100 of the Energy Act 2008]]; 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. [...]

26. It further explained that the information at issue is information which has been obtained by virtue of the provisions listed under the statutory provisions set out at section 105(1)(a). Ofgem is a creature of statute, formed under the Utilities Act and performing functions under the Electricity Act, Gas Act and various legislation. Any information that comes into its possession for the purposes of performing its regulatory functions listed under section 105(1)(a) including its role under CEARA and the ADR Regulations 2015, shall not be disclosed.
27. CDRL's application to become an Ombudsman was considered under powers exercisable by Ofgem under CEARA to approve redress schemes in its capacity as the relevant regulator in respect of disputes between relevant consumers and a regulated provider, which is a person holding an electricity and/or gas licence. Ofgem is therefore the relevant regulator under CEARA by virtue of its functions contained in, and powers to issue licences under, the Utilities Act, Electricity Act and Gas Act.
28. CDRL's application to provide ADR services was considered under powers exercisable by Ofgem under the ADR Regulations. Regulation 8 of the ADR Regulations "Functions and designation of competent authorities" provides at subsection (3) that,
- (3) Subject to paragraph (2), each [person] specified in Part 2 of Schedule 1 is—*
- (a) a competent authority for the purposes of these Regulations in relation to the area for which it has regulatory responsibility or any area for which it has oversight under any enactment, and*
- (b) the relevant competent authority in relation to an ADR entity or ADR applicant which offers alternative dispute resolution services in that area*
29. Part 2 of Schedule 1 of the ADR Regulations lists Ofgem as a competent authority. However Regulation 8(3) restricts its competence to *"the area for which it has regulatory responsibility or oversight under any enactment"*. The expression *"regulatory responsibility"* is not defined in the ADR Regulations, however it is clear that such responsibilities are those duties and functions given to Ofgem under *"any enactment"*, which includes those set out at section 105(1)(a) of the Utilities Act, particularly the regulation of the gas and electricity market in Great Britain. Ofgem is the designated regulatory authority for Great Britain for the purposes of the Electricity and Gas Directives, as outlined in

section 3A of the Utilities Act. It follows therefore that Ofgem's functions under the ADR Regulations arise by virtue of the provisions of the Utilities Act, Gas Act and the Electricity Act.

30. The correspondence with CDRL and the responses gathered in response to the open letter were obtained by virtue of Ofgem's powers set out in Schedule 1(11)(1) of the Utilities Act to "*do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.*" The correspondence with CDRL and responses to the open letter were obtained in order to facilitate Ofgem's functions of approving Ombudsman redress schemes and ascertaining a suitable ADR in relation to the area for which Ofgem has regulatory responsibility under the Utilities Act, Gas Act and Electricity Act. As such the information at issue has been obtained by virtue of Ofgem's competencies listed under section 105(1)(a) and the prohibition on its disclosure applies.
31. Ofgem noted that it may use the gateways under section 105 but are not obligated to. It did not consider any of the gateways in section 105 to be applicable. In addition it did not consider it was practical to obtain consent. Ofgem further noted that where there is a relevant gateway to disclosure under section 105 of the Utilities Act, Ofgem has a power to disclose, not a duty. This was affirmed by the Commissioner in a decision of 22 October 2015⁷.
32. At paragraph 16 of that Decision Notice, the ICO says: "*Ofgem has discretion as to whether or not to use the gateways to disclose specified information*". As such the FOIA places no requirement on Ofgem to consider the use of the relevant gateways.
33. Ofgem therefore consider that section 44 provides an absolute exemption to the information requested.
34. In the Commissioner's view, the operation of the statutory bar is dependent on whether the information was obtained pursuant to one of the statutory functions covered by section 105(a). As explained above Ofgem's functions under the ADR Regulations arise by virtue of the provisions of the Utilities Act, Gas Act and the Electricity Act.
35. Furthermore, the Commissioner is satisfied that the withheld information directly relates to the affairs of a particular business i.e. CDRL. The

⁷ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560056/fs_50591526.pdf

Commissioner therefore finds that Ofgem has correctly applied section 44(1)(a) to the withheld information.

36. Section 44 is an absolute exemption, consequently there is no need to consider the public interest test.
37. As the Commissioner considers section 44(1)(a) applies to all the remaining withheld information she has not gone on to consider the application of section 40(2). The Commissioner does not require Ofgem to take any action.

Other matters

38. The Commissioner notes that in its initial response, Ofgem's explanation of section 44 was not clear. Understandably the complainant assumed that the information was being withheld due to it being related to potential prejudice to business affairs, rather than the fact that there is legislation in place which prohibits Ofgem from disclosing it. This legislation does not apply to the other organisations that have provided information to the complainant.
39. The Commissioner therefore recommends that Ofgem ensure that its responses clearly explain what exemption is being applied and why.
40. The complainant also raised concerns that Ofgem discovered further information at the internal review stage. Consequently, the Commissioner refers Ofgem to the Section 46 Code of Practice⁸ to consider if improvements can be made to its records management.

⁸ <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Right of appeal

41. 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

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

42. 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.
43. 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

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