

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 January 2015

**Public Authority:** Ofgem  
**Address:** 9 Millbank  
London, SW1P 3GE

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to business data disclosed to a third party.
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

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4. On 27 August 2014, the complainant wrote to Ofgem and requested information in the following terms:  
*"Can you tell me which supplier you released our information to please?"*
5. Ofgem responded on 2 September 2014. It refused to provide the requested information and citing section 44 of the FOIA as its basis for doing so.
6. Following an internal review Ofgem wrote to the complainant on 29 September 2014 and maintained its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 22 October 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if Ofgem has correctly applied section 44 of the FOIA to the withheld information.

## Background

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9. In August 2014, Ofgem erroneously released commercial data relating to a number of licensed energy suppliers to a consulting group, who then disclosed this data to its client. As soon as the error was known, Ofgem contacted both parties, who agreed to permanently destroy the data. Ofgem then contacted the affected energy suppliers to inform them of the erroneous data release and subsequent destruction of the data.

## Reasons for decision

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### *Section 44 prohibitions on disclosure*

10. 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,"*

11. 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.*

12. It considered section 105(1) applied because:
  - a) it obtained the information pursuant to one of the statutory functions covered by section 105(1)(a); and
  - b) the information directly relates to the affairs of the consulting groups' client, and potentially the consulting group.
13. As a regulatory body Ofgem is required to hold a large amount of material about the businesses it regulates, and even relatively minor information releases can result in Ofgem not being able to access information needed for its regulatory duties. Ofgem stated it was therefore reliant on the integrity of section 105 and thus section 44 FOIA in protecting the interests of the companies that it regulates.
14. In relation to a) Ofgem learned who the client was which received the information while investigating and mitigating its inadvertent disclosure. These actions were carried out pursuant to Ofgem's functions under Schedule 1, Para 11 of the Act<sup>1</sup> to  
  
*'do anything which is calculated to facilitate, or is conducive or incidental to, the performance of [the Authority's] functions.'*  
  
Schedule 1, Para 11 is one of the functions that is covered by section 105(1)(a).
15. The Commissioner considers that the identity of the client was discovered as Ofcom was carrying out one of its statutory functions. That is, Ofgem was doing something (investigating the disclosure of date) that was incidental to its functions.
16. In relation to (b), Ofgem considered that disclosing the information would disclose the fact that as part of its affairs the client received, briefly held and then deleted this data. Further, Ofgem considered that disclosure would also have the effect of disclosing that the client retained the services of a consultancy firm as part of its ongoing business affairs.
17. The Commissioner is satisfied that the withheld information directly relates to the affairs of a particular business i.e. the consulting group and its client.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2000/27/schedule/1>

18. Ofgem then went on to consider whether it could disclose the information using an applicable statutory gateway. As part of its consideration of whether to disclose the information to the complainant, Ofgem sought the client's consent for the proposed disclosure.
19. This would have allowed Ofgem to use the statutory gateway in section 105(2) of the Act to disclose. Ofgem provided the Commissioner with evidence that it had sought consent and this had been refused. Part of the client's rationale was that disclosure of its identity (which they said was made to Ofgem in confidence) would cause damage to their interests. There has been no change in its stance. Ofgem's view remains that without the client's consent it is unable to release this information because section 105(1) of the Act continues to apply in this case in respect of the information.
20. Ofgem then considered whether disclosure of the client's identity to the complainant would facilitate its function (under Schedule 1, Para 11 of the Act) of taking action to investigate and mitigate its inadvertent disclosure of the information to the client. However, Ofgem considered that in this instance it was only necessary for mitigation purposes that the affected companies know that a) a licensed energy supplier received the data accidentally; and b) the supplier subsequently gave Ofgem assurances that the information had been permanently deleted.
21. In Ofgem's view, disclosure of the client's identity is not necessary to facilitate the function of mitigating the impact of the disclosure, and so considered that the section 105(3)(a) gateway is not applicable here.
22. Ofgem therefore considered that as the FOIA does not override other laws that prevent disclosure, in light of the reasons set out in the above paragraphs its view was that section 105 of the Act remains a statutory bar. Therefore it considered that disclosure of the information was and continues to be prohibited under the Act, and the absolute exemption in section 44 of the FOIA applies to the information.

### *Conclusion*

23. In the Commissioner's view, the operation of the statutory bar in this case is dependent on the consideration of whether the information, ie the identity of the supplier was obtained pursuant to one of the statutory functions covered by section 105(1)(a).
24. Ofgem has explained that it obtained the information when investigating and mitigating its inadvertent disclosure. The investigation was carried out as part of its statutory functions, namely Schedule 1, Para 11 of the Utilities Act 2000.

25. The Commissioner therefore finds that Ofgem has correctly applied section 44(1)(a) to the withheld information.
26. As section 44 is an absolute exemption, there is no need to consider the public interest test.

## Right of appeal

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27. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

28. 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.
29. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**