

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 May 2018

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

Address: 9 Millbank
London
SW1P 3GE

Decision (including any steps ordered)

1. The complainant made a request to Ofgem for information regarding its investigation into energy suppliers' installation of Advanced Meters. Ofgem dealt with the request under the Freedom of Information Act (FOIA) and withheld the information under a number of exemptions under that legislation. The complainant had argued that the request ought to be considered under the EIR and whilst Ofgem maintained that FOIA was the correct regime to apply, it said that if the request was considered under the EIR then the information would be withheld under the exceptions in regulations 12(4)(e) (internal communications), 12(5)(b) (the course of justice etc), 12(5)(d) (confidentiality of proceedings), 12(5)(e) (commercial confidentiality) and regulation 13 (personal data).
2. The Commissioner's decision is that the request is for environmental information and therefore the EIR applies. However, the Commissioner also found that the withheld information is exempt under regulation 12(4)(e) and 12(5)(b) and the public interest in maintaining the exceptions outweighs the public interest in disclosure. For one document the Commissioner found that regulation 13 is engaged. The Commissioner requires no steps to be taken.

Request and response

3. This decision notice relates to two requests for information the complainant made to Ofgem the first of which was on 5 February 2016 and which concerned energy suppliers' roll-out of Advanced Meters. The request read as follows:

"We are seeking in order of importance/accessibility;

- i. The level of rollout that did not trigger investigation*
- ii. The level of rollout of the marginal non investigated supplier (ranked by rollout %)*
- iii. The anonymised supplier AMR install percentages as of 1 April 2014.*
- iv. Visibility of whether they are of the six largest energy suppliers or not*
- v. Visibility of which of these in (iv) are the three subject to investigation"*

4. Ofgem responded to the request on 25 February 2016 when it confirmed that the information in part (i) of the request was not held. For parts (ii) to (v) of the request it explained that the information was exempt under section 31 (Law enforcement) and section 44 (Prohibitions on disclosure) of FOIA. The complainant made a second request on 14 September 2016 for the following information:

"3) Information provided to the Settlement Committee. We would be grateful if you could please send to us all information provided to the Settlement Committee, whether this be in advance, in session, or subsequent to the meeting on 19 August 2016. Please can you send us the minutes and notes from the Settlement Committee meeting."

"7) Please provide for us the most recent AMR rollout figures for the other suppliers, anonymised but categorised into the six large energy firms (including [the complainant] so that we are clear on like for like comparison), mid tier (more than 250,000 accounts), and others with more than 50,000 electricity accounts."

5. Ofgem responded to this request on 30 September 2016. For the first part of the request it disclosed a small amount of redacted information but explained that the remainder of the information was being withheld under the exemptions in section 21 (Information accessible by other means), section 31 (Law enforcement), section 40 (Personal information), section 42 (Legal professional privilege) and section 44 (Prohibitions on disclosure). For the second part of the request it

explained that the information was being withheld under the section 44 exemption.

6. The complainant now asked Ofgem to complete an internal review of its handling of the two requests. In doing so it also suggested that the requests constituted environmental information and therefore should have been considered under the Environmental Information Regulations.
7. Ofgem subsequently agreed with the complainant that it would take the approach of first considering the two requests afresh under the EIR but that if it found that the EIR did not apply it would go on to carry out an internal review of its handling of the requests under FOIA.
8. On 13 February 2017 Ofgem explained that it had considered the requests under the EIR but that it had decided that the requests were not for environmental information and therefore the EIR did not apply. Nevertheless, it referred to some of the exceptions within the EIR which it said would be likely to apply to the requests if the information was found to be environmental. In particular, it said that regulation 12(4)(e) (internal communications) and regulation 12(5)(e) (commercial confidentiality) would apply.
9. Ofgem presented the findings of its internal review on 8 March 2017 which upheld its decision to refuse to disclose the requested information under FOIA.
10. On 30 June 2017 the complainant contacted Ofgem again to ask that it reconsider the application of the EIR.
11. Ofgem contacted the complainant on 25 August 2017 and noted that the complainant's correspondence had been received over 90 working days since it had refused the request under the EIR on 13 February. It explained that regulation 11 of the EIR provides that an applicant must make a request for an internal review no later than 40 working days after the date on which the applicant believes the public authority has failed to comply with the request. In any event, Ofgem said that it was also aware that the complainant had by now complained to the Commissioner and so it saw little purpose in continuing correspondence on this matter. It also suggested that the Commissioner ought to exercise her discretion to refuse to consider the complaint on the basis that the complainant had failed to first exhaust the procedure by which complaints can be made and there had been an undue delay in submitting the complaint to the Commissioner.
12. Nevertheless, Ofgem went on to say that it remained of the view that the requested information was not environmental but said that should

the Commissioner or any subsequent court hearing determine that the EIR applies it would set out its consideration of which exceptions under the EIR applied and it reserved the right to make these arguments before the Commissioner.

Background

13. The requested information relates to Ofgem's investigation of the complainant's (a UK energy supplier) Advanced Meter obligations.
14. Ofgem has the responsibility for granting licences for the supply of electricity pursuant to s.6 of the Electricity Act 1989 ("the 1989 Act"). Such licences are subject to Standard Licence Conditions (SLCs) which are "relevant conditions" for the purposes of the 1989 Act. Regulated parties operating under the terms of their licences are known as "Licensees".
15. SLC 12.17 to 12.22 of the Electricity Supply Licence (the 'Advanced Meter Obligations') provide that (i) from April 2009 Licensees (including the complainant) were under an obligation to roll-out Advanced Meters to non-domestic customers at relevant premises. A failure to have taken all reasonable steps to install such Advanced Meters by April 2014 would result in a contravention of SLC 12.21, and (ii) from April 2009 whenever a licensee (including the complainant) had to install an electricity meter at such a customer's premises, such a meter must be an Advanced Meter. The installation of a non-Advanced Meter at a relevant premises after April 2009 is a contravention of SLC 12.18.
16. An 'Advanced Meter' is a meter which is able to perform the functions specified in SLC 12.19, meaning that it has to provide measured electricity consumption data and be able to relay that information remotely to the Licensee.
17. Ofgem explained that it opened an investigation into the complainant's compliance with the Advanced Meter Obligations on 14 October 2014. It said that in such cases its approach is for employees working in a "case team" to investigate suspected contraventions. Their preliminary thinking on their investigative findings is then presented to the regulated party in a Summary Statement of Initial Findings ("SSIF"). The regulated party is then given an opportunity to respond. The case team then refers its findings and a summary of the regulated party's response to a separate group of Ofgem employees referred to as the "Settlement Committee". The Settlement Committee is authorised on behalf of Ofgem to determine a regulated party's liability, appropriate

settlement conditions and a penalty amount at which it would be prepared to settle the current investigation. The Settlement Committee meets without the regulated party being present but takes recommendations from the internal case team, including the regulated party's representations when determining settlement terms. A regulated party which settles the investigation at this stage is given a settlement discount on the statutory penalty it would otherwise be expected to pay. The settlement terms are offered to the regulated party, which may decide to accept or reject those terms.

18. If a licensee declines to settle the case they are able to contest the case team's findings through Ofgem's "contested procedure". During this process the case team will serve the licensee with a detailed Statement of Case (STOC) setting out all of the information on which Ofgem seeks to rely. They are then given the opportunity to respond in full to the STOC and make oral representations before a contested hearing of the Enforcement Decision Panel (EDP). The Commissioner understands that this procedure involves a much greater expenditure of resources and takes longer than if a licensee decides to settle the case. The contested procedure is run on a quasi-judicial basis.
19. On 19 August 2016 the Settlement Committee determined that it was prepared to settle Ofgem's case against the complainant and offered it settlement terms. Ofgem has confirmed that the complainant has declined to settle and accordingly been served with Ofgem's STOC and supporting evidence on 12 July 2017. Proceedings against the complainant for a contravention of its Advanced Meter Obligations are at the Contested Procedure stage.

Scope of the case

20. On 8 June 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
21. The Commissioner considers the scope of her investigation to be to consider whether the request ought to have been dealt with under the Freedom of Information Act or Environmental Information Regulations and depending on which regime applies, whether any of the exemptions or exceptions to disclosure in FOIA or the EIR apply to the withheld information.
22. During the course of the Commissioner's investigation Ofgem confirmed that should the Commissioner find that the requests ought to have been considered under the EIR it would seek to rely on the exceptions in

regulations 12(4)(e) (internal communications), 12(5)(b) (course of justice etc), 12(5)(d) (confidentiality of proceedings), 12(5)(e) (commercial confidentiality) and 13 (personal data) (in respect of document 14 only).

23. Notwithstanding this, Ofgem has also argued that the Commissioner should have declined to consider the complaint because it was submitted after undue delay as required by section 50(2)(b) of FOIA on the basis that it had taken over twice the statutory time period to make representations on Ofgem's EIR refusal of 13 February 2017. Alternatively, it suggested that the complaint had been submitted prematurely before it had exhausted the internal review procedure under the EIR.
24. Under regulation 11(2) of the EIR an applicant may request an internal review of a public authority's handling of his or her request but this must be done no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the EIR. In this case Ofgem refused the request under the EIR on 13 February 2017 but the complainant did not ask it to complete an internal review until 30 June 2017. Ofgem argued that the complainant's representations on its regulation 14 refusal notice were received "so late after the 40 working days within which it must be received that they cannot satisfy regulation 11(2)" and that therefore the "inability to satisfy regulation 11(2) means that a complaint to the ICO is incompetent".
25. The Commissioner has considered Ofgem's comments but has decided to accept the complaint. In doing so she is mindful that there was some confusion over which regime applied and Ofgem handled the requests under both FOIA and the EIR. It completed a full internal review on 8 March 2017 under FOIA and the complainant submitted their complaint to the Commissioner within a reasonable period of this having been completed. This internal review also advised the complainant to submit a complaint to the Commissioner if they remained dissatisfied and so it is understandable that they decided to complain to the Commissioner at this point despite the fact that Ofgem had not yet completed a full internal review under the EIR as well.
26. In any event, the Commissioner has discretion to consider a complaint even where it is made out of time or where a complainant has failed to exhaust any internal review process a public authority may have, and in the circumstances of this case it is appropriate that she does so.

Reasons for decision

Environmental information

27. The first question for the Commissioner to consider is whether the requests are for environmental information and therefore whether the FOIA or the EIR is the correct regime under which to process the request.
28. So far as is relevant here, regulation 2 of the EIR defines environmental information as:
- “...any information in written, visual, aural, electronic or any other material form on—*
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
29. In this case the Commissioner would take the view that information regarding the energy industry's adoption of Advanced Meters is environmental information falling within the scope of regulation 2(1)(c), being information on a measure likely to affect one of the factors in regulation 2(1)(b). Ofgem's regulation and enforcement of the industry's roll out of Advanced Meters is likely to have an impact on the success of this initiative and disclosure would better inform the public on the extent to which companies are meeting their obligations to reduce energy consumption by installing these meters. Therefore the Commissioner would conclude that the EIR is the more appropriate regime to apply in the circumstances.

30. Ofgem has said that if the Commissioner decides that the requests should be considered under the EIR, it would seek to rely on the exceptions in regulations (12)(4)(e) (internal communications), 12(5)(b) (course of justice etc), 12(5)(d) (confidentiality of proceedings) and 12(5)(e) (commercial confidentiality). In the Commissioner's view regulation 12(4)(e) and regulation 12(5)(b) appear the most relevant exceptions in the circumstances of this case and she will consider whether these would apply first before going on to consider the other exceptions if necessary.

Regulation 12(4)(e) – Internal Communications

31. Ofgem has identified 24 documents falling within the scope of the request. A number of these documents have already been made available to the complainant or else are correspondence sent or received by them (documents 2 – 13). The Commissioner understands that this information is not in dispute. There are a remaining 12 undisclosed documents. Document 1 contains installation rate data for the "Big 6" energy suppliers. This comprises the information requested in parts (ii) to (v) of the complainant's first request. Ofgem explained that the information in part (i) is not held since it has never established a level of roll out (of smart meter installation) which triggered an investigation and again the Commissioner understands that this is not in dispute. Ofgem clarified that it also considered part 7 of the complainant's second request to be a repeat of the parts (ii) to (v) of the first request but for the most recent data up to the date of the complainant's request. This is contained in document 24. The Commissioner has referred to documents 1 and 24 together as the "the Installation Rate Data".
32. Documents 14 to 23 comprise information provided to the Settlement Committee "the Settlement Committee Documentation" which was requested at part 3 of the complainant's second request.
33. The Commissioner understands that all of this information has been withheld under the regulation 12(4)(e) exception which provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications.
34. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. In this case the settlement committee documentation was provided by Ofgem's Case Team to its Settlement Committee to allow them to reach a decision on their investigation. Ofgem explained that each of the documents was provided to the members of the

Settlement Committee in August 2016 before the committee convened on 19 August 2016 to make its decision on those papers. It said that the documents were then saved to its internal files and continue to be consulted in the course of this live case. The Settlement Committee is an internal committee staffed entirely by employees of Ofgem. In the Commissioner's view this information clearly falls within the definition of an internal communication and she is satisfied that regulation 12(4)(e) is engaged.

35. Documents 1 and 24 contain information which the Commissioner understands originated from the different energy suppliers about the rate at which they had installed smart meters at relevant premises – expressed as a percentage of the total number of customers within their portfolios. Ofgem explained that it created these anonymised documents in response to the complainant's request but the actual information was retrieved from a separate document (document 17) which Ofgem described as a more detailed table setting out the relative installation numbers across the remainder of the industry, "which is not anonymised and provides a far greater level of granularity". Ofgem acknowledged that this documentation contained information received from third parties. However, it also explained that the information was set out in communications between members of Ofgem's staff (from the case team to the settlement Committee) and therefore it considered this to be internal communications.
36. The Commissioner would agree that the Installation Rate Data in documents 1, 24 and 17 amount to internal communications. In reaching this view the Commissioner is mindful of her guidance on regulation 12(4)(e) which makes it clear that a communication can still be internal even where it contains information received by a third party.

"Communications can still be internal even if they record discussions with third parties or contain information received from third parties. For example, a note of a meeting with a third party, created and circulated within a public authority for its own use, is still an internal communication. It is the form of the communication that is important, rather than its content." (para 30).¹

37. In this case the Commissioner accepts that document 17 was created to communicate information between Ofgem's case team and the settlement committee. It has not been shared outside of Ofgem and so

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

regulation 12(4)(e) applies. Documents 1 and 24 also fall under this exception since they are effectively anonymised versions of the same communication, created by Ofgem in response to the request. The Commissioner has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosure

38. The complainant argued that there was a strong public interest in accountability and transparency in allowing the public the ability to inspect the raw data (on installation rates) so as to further understand the performance of the Smart Meters programme and the performance of individual energy providers. This was especially true since, it said, energy providers have claimed that the requirement to roll out smart meters is inflating energy bills. It also noted that at least one energy provider had voluntarily disclosed information on their performance on the installation of smart meters to aid in public debate as to the appropriateness of the roll out targets set by the government and which may also lead to debate on a potential change to this policy.
39. Noting that arguments for maintaining the regulation 12(4)(e) exception often focused on the need for a "safe space" to discuss issues and make decisions, and the potential that disclosure would have a "chilling effect" on the ability of officials to discuss matters freely and frankly, the complainant explained why they felt that in the particular circumstances of this case these arguments should not attract any weight. In particular the complainant referred to the Commissioner's guidance on the regulation 12(4)(e) exception which, at paragraphs 50-51, explains that the safe space argument will be relevant until a decision has been made and that following the announcement of that decision there is "likely to be increasing public interest in scrutinising and debating the details of the decision". It argued that as the decision to commence an investigation (into the complainant's installation of Advanced meters) had been made public in 2014 it considered that the requirement for a safe space had long since elapsed prior to the request.
40. As regards the chilling effect argument, the complainant said that this could not apply to the installation rate data since this was only "raw data" which fell outside the scope of internal discussions.
41. The complainant stressed that the requested information related to a number of related but separate themes and that the public interest

considerations were different for each group of requests. It suggested that the requests fell into the following 3 broad categories.

- Requests (i) to (v) made on 5 February 2016 sought information to assist the complainant in understanding the rationale behind the decision made and published in 2014 to investigate the complainant and two other energy suppliers.
- The second part of the 14 September 2016 request sought information on the ongoing progress made by all energy suppliers after Ofgem's statutory deadline by which all relevant business customers should have been supplied electricity via an Advanced Meter.
- The first part of the 14 September 2016 request sought information to help understand the reasoning behind the settlement committee's decision.

42. The complainant stressed that the decision to commence an investigation into its compliance with its Advanced Meter obligations had been made public, with some reasons in 2014, i.e. before it submitted its requests. Therefore, it suggested that any public interest in maintaining the exemption was reduced. It noted that Ofgem had issued a press release in 2014 publicising its investigation where it stated that:

"based on our assessment, the roll-out was only 75% complete in electricity, compared to 86% complete in gas, [two energy suppliers] had the lowest completion rates in electricity, accounting for over half of the 40,000 advanced electricity meters still waiting to be installed."

43. The complainant argued that disclosure would provide greater clarity and transparency in respect of Ofgem's decision to commence an investigation and that disclosure would be unlikely to have any adverse effect above and beyond that which may have already been caused by the press release.

44. The complainant went on to say that it believed that there was a strong public interest in the public being made aware as to how and why a regulator considers that a supplier may be in breach of a statutory obligation. It said that this was especially true where the legislation is ambiguous and there is no other published guidance of what the regulator considers amounts to a breach of the statutory requirement.

Public interest arguments in favour of maintaining the exception

45. Ofgem provided the Commissioner with a detailed submission outlining its arguments as to why it considers the public interest favours maintaining the exception. Whilst the Commissioner has not reproduced

every point made by Ofgem she has reviewed all of the withheld information and taken all of the arguments into account when balancing the public interest. The Commissioner has summarised the relevant arguments below.

46. Ofgem argued that if the Settlement Committee documentation was made public it would undermine the basis on which it was able to settle investigations to such an extent that the settlement of regulatory investigations would become extremely difficult or impossible. It explained that the Settlement Committee considers material placed before it by the case team for the determination of the appropriate resolution of an enforcement case on a settled basis. It said that it was essential that the Settlement Committee is provided with a safe space in order to deliberate and make these determinations. If the Authority's internal decision-making process for settlement is not afforded this safe space it would, it said, severely undermine its ability to settle enforcement cases against regulated parties and remove the purpose and benefit of providing companies under investigation a significant settlement discount. It argued that to give the complainant full knowledge of the material placed before the Settlement Committee would reveal the strengths and weaknesses of the Settlement Committee's hand when reaching a decision on the appropriate settlement.
47. Ofgem explained that the Settlement Committee uses the internal communications sent to it to make its decisions in the prospect that those decisions on the appropriate course of action may be the subject of litigation. This information, it said, reveals its pre-litigation strategy for the resolution of the case against the complainant. It referred to the 'chilling effect' argument which refers to the inhibition on the free and frank discussion within public authorities. It said that it considered that in this case the chilling effect of disclosure "would be so severe as to lead to a realistic prospect of [Ofgem] abandoning its current settlement processes".
48. The Settlement documentation includes a discussion of the Committee's thoughts on the strength of its position and the internal assessments made to establish its settlement position. Ofgem argue that disclosure would mean that it is unable to pursue settlement discussions. It stressed that this case was still "live" both for the complainant and for the energy market as a whole. It explained that whilst its case was proceeding against the complainant on a "contested" basis, the complainant still had the opportunity to settle and disclosure would reveal the basis on which it was prepared to settle and so would be a disincentive to the complainant from settling the case against it.

49. Ofgem explained that the enforcement of Advanced Meter obligations across the electricity industry is also a live issue. It said that it had already taken action against a number of licensees for a contravention of the obligations and was committed to keeping the performance of the market under review and taking further action for potential contraventions. Disclosure would also prejudice any future investigations and Ofgem's ability to achieve settlement in those cases, it said. It went on to say that disclosure would mean that the complainant or any other regulated party in a future case would have access to its internal communications on the strength of its case and would therefore reject or dispute settlement in all circumstances where the information highlighted potential weakness in the case against them. Regulated parties would not be prejudiced in a similar way.
50. Ofgem argued that the Settlement Process was in itself in the public interest since this allows it to agree settlement terms on a preferable basis to the outcomes that are available through its statutory enforcement powers alone.
51. Ofgem referred to the safe space which it said was needed to allow it to consider the relevant material and reach a determination on liability free from distractions. It argued that disclosure of the information could lead to it receiving representations from interested parties ranging from other energy providers to individuals with strongly held views on the matter. Those representations would be voluminous, it said, and interrupt and distract its work. It said that disclosure would fundamentally undermine the ability of the Settlement Committee to make determinations without the distraction of external influences from other licensees or individuals.
52. In respect of the Installation Rate Data, Ofgem was also particularly concerned that disclosure would lead the industry to believe that there was a "threshold" at which Ofgem would consider enforcement action. The Internal Communications exception is very broad and so potentially captures a wide range of information. However, the Commissioner takes the view that that arguments for maintaining the exception should be focussed on the protection of internal deliberation and decision making processes and that some internal communications will have more protection under other exceptions. Arguments around the ability of Ofgem to take enforcement action are more appropriate to the regulation 12(5)(b) exception and the Commissioner will return to this point below.

Balance of the public interest arguments

53. The Commissioner has considered the competing arguments and accepts that there is a public interest in disclosure in so far as this would promote transparency and accountability around Ofgem's decision making. There is a particular public interest surrounding disclosure of the installation rate data since this would allow the public to better understand the Smart Meters programme and the performance of individual energy providers.
54. Whilst the Commissioner accepts that there is a public interest in promoting transparency and accountability she is also mindful that there is already a statutory requirement to allow interested parties to comment on a proposed statutory penalty notice under the 1989 Act. This ensures transparency and allows for public participation in the decisions Ofgem makes, whereas disclosure of the withheld information would undermine the statutory consultation process which Parliament has put in place. In the Commissioner's view this reduces the public interest in disclosure somewhat.
55. Any public interest in disclosure also has to be balanced against the harm that would be caused to Ofgem's ability to carry out its regulatory and enforcement activities. In future Ofgem would be discouraged from discussing the strengths and weaknesses of cases for fear that this information might be disclosed and this would ultimately make it very difficult if not impossible to carry out its strategy of trying to settle cases wherever possible.
56. The complainant had suggested that any arguments for maintaining the exception will carry little weight since the information relates to an issue that is already well advanced given that the decision to investigate the complainant and other energy providers had already been taken and made public. The Commissioner does not accept this argument because the information does not just relate to the decision to commence an investigation. Rather the information focuses on Ofgem's attempt to conclude the investigation by way of reaching a settlement with the energy supplier or by taking formal action through the contested procedure. This is very much a live process and so there is still a significant public interest in withholding the information until this process is complete.
57. The Commissioner accepts that if the information was disclosed (both the settlement committee documentation and the installation rate data) it is very likely that this would attract external comment and representations from various parties which would distract Ofgem from its investigation and make it that much harder for it to reach a

settlement in this case. In the circumstances, a safe space is still required to allow Ofgem to conclude this matter and prepare for any potential litigation, and therefore this argument attracts significant weight.

58. The Commissioner has also considered Ofgem's argument that disclosure would have a Chilling effect on its ability to discuss enforcement cases freely and frankly. Chilling effect arguments operate at various levels and the weight they attract will depend on the circumstances of the case. The Commissioner's guidance on regulation 12(4)(e) makes it clear that where an issue is still live such arguments are likely to carry significant weight.

*"If the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight. Arguments about a chilling effect on closely related live discussions may also carry weight."*² (para. 54)

59. This argument applies primarily to the Settlement Committee documentation and having reviewed the withheld information the Commissioner accepts that disclosure would make it very difficult, if not impossible, for the Committee to discuss this particular case but also future cases involving an energy provider's Advanced meter obligations which the Commissioner accepts will be very closely related. The withheld information in this case involves a discussion about the strengths and weaknesses of Ofgem's position, recommendations made by the case team, assessments of the complainant's arguments, legal advice on the risks of proceedings to take the case to the contested stage and it is clear that Ofgem would be very severely constrained in having these types of discussions if they felt the information would become available to a regulated party whilst it was in the process of taking enforcement action.
60. Given the content and sensitivity of the information the Commissioner is satisfied that the chilling effect arguments attract significant weight. The fact that the issue is still live and Ofgem continues to monitor the performance across the industry and further enforcement action remains a possibility also weighs strongly in favour of maintaining the exemption.

² https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

61. Finally, the Commissioner has taken into account Ofgem's argument that it is in the public interest for it to be able to resolve disputes through the settlement process. The Commissioner understands that through this process Ofgem can resolve cases on a more preferable basis to the outcomes that are available through its statutory enforcement powers alone. Under its statutory enforcement powers Ofgem may only impose a penalty and/or make an order on a regulated party to do something in respect of the contravention. Ofgem explained that a settlement is an agreement between the parties and therefore it enables the parties to reach agreement on a range of factors not covered by statutory enforcement powers. Ofgem gave examples of previous cases where it was able to secure advantageous terms for the consumer through the settlement process and explained that if it disclosed the settlement committee documentation licensees would be able to compare their settlement terms with those offered to other licensees and therefore decline to settle on quite as advantageous terms to the consumer as might otherwise have been obtained. The Commissioner accepts that this would not be in the public interest and she is also mindful that if more cases had to go through the full contested procedure this would involve far greater levels of Ofgem's resources, expenditure and time. Again, the Commissioner considers that these arguments weigh strongly in favour of maintaining the exception.
62. The Commissioner accepts that there is a public interest in disclosure but given the timing of the request, the fact that the information relates to a live issue and the extent of the prejudice that would be caused to Ofgem's Settlement process she has found that this is outweighed by the public interest in maintain the regulation 12(4)(e) exception.

Regulation 12(5)(b) – Course of justice etc

63. The Commissioner is satisfied that all of the information falls under the regulation 12(4)(e) exception and as explained above, the public interest favours maintaining that exception. However, the Commissioner is aware that some of the withheld information comprises legal advice and she has also found that some of the arguments for withholding the information are more relevant to the regulation 12(5)(b) exception. Under the EIR it is possible to aggregate the public interest arguments under different exceptions and therefore the Commissioner considers it appropriate to go on to consider whether regulation 12(5)(b) might also apply.
64. Regulation 12(5)(b) provides that a public authority can refuse to disclose information to the extent that disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the

ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”.

65. Regulation 12(5)(b) is broad in scope and in this case the relevant part of the exception is “the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. The Commissioner has issued guidance on regulation 12(5)(b) where she explains what information is likely to be covered by this part of the exception.

“information about law enforcement investigations or proceedings. This would cover the obvious example of information about a police investigation but could also include information about other types of civil and criminal investigations and proceedings, such as those carried out under planning or charity law, or those related to tax collection, immigration controls and health and safety regulations;”³

66. In this case the requested information concerns an ongoing inquiry under the Electricity Act 1989. Ofgem investigates and imposes statutory penalties or orders on regulated parties where they are found to be in contravention of statutory requirements and therefore the Commissioner would accept that this qualifies as law enforcement investigations or proceedings for the purposes of regulation 12(5)(b). The exception can be applied to information held in respect of Ofgem’s enforcement functions.
67. As regards the issue of whether disclosure would adversely affect the course of justice, the Commissioner would refer to the arguments discussed above in relation to regulation 12(4)(e). As she has explained, the Commissioner is satisfied that disclosure would make it harder for Ofgem to pursue its investigation into the complainant’s compliance with its Advanced Meter Obligations but also future cases against other energy providers.
68. There is a particular case for withholding the Installation Rate Data due to the effect this would have on future Ofgem investigations into Advanced Meter Obligations and similar obligations. Disclosure would reveal at what level of installation Ofgem took enforcement action. Ofgem has explained that it is possible that future investigations will be opened into the energy providers who are featured in the Installation Rate Data. It has argued that disclosure may potentially give the

³ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

industry the misapprehension of the “threshold” level at which it will consider enforcement action and give a false impression that those energy providers who were not investigated for a breach of the Advanced Meter Obligations were either compliant with those obligations or achieved such an advanced level of installation that Ofgem were content not to take action.

69. The Commissioner accepts that disclosure would enable energy providers to predict the level of advanced meter roll-out that they judge is either “acceptable” or at which Ofgem will not pursue enforcement action. In this way disclosure would adversely affect the course of justice because it would mean that the prospect of enforcement action would become more predictable to licensees.
70. Ofgem also raised concerns that disclosure would lead to licensees becoming less open and transparent in how they provide information and cooperate with investigations. It explained that “there is the potential for obstruction or deliberate obfuscation by Licensees should they wish to evade providing true reports to Ofgem”. This is because, it said, if licensees were aware that the material is to be published they may seek to massage information to present that information in the best possible light for publication. Having reviewed the withheld information, the Commissioner accepts that disclosure would discourage licensees from cooperating with Ofgem to the fullest extent and consequently this would make it harder for Ofgem to carry out its investigations.
71. For these reasons the Commissioner has decided that disclosure would adversely affect the course of justice and therefore the regulation 12(5)(b) exception is engaged.

Legal professional privilege

72. As the Commissioner has explained above, the regulation 12(5)(b) exception is broad in scope and it is accepted that the “course of justice” will also include the protection of information subject to legal professional privilege. In the case of *Kirkaldie v Information Commissioner and Thanet District Council* the Information Tribunal stated that:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve

this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."⁴

73. Legal professional privilege is the concept which protects the confidentiality of communications between a lawyer and client. It has been described as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."*⁵

74. There are two types of legal professional privilege. Litigation privilege applies where litigation is proposed or contemplated and advice privilege applies where no litigation is contemplated. In this case both categories of privilege are relevant. The privileged information sets out confidential communications between a lawyer and their client for the dominant purpose of giving legal advice. As the Commissioner has already explained, the Settlement Committee documentation is prepared in contemplation of further litigation and having reviewed the information it is clear that the advice was clearly prepared in contemplation of such proceedings.
75. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports. What matters is that information must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation. The Commissioner has reviewed the withheld information which is contained within documents 15 and 21 and she is satisfied that the information was created for the dominant purpose of providing legal advice.

⁴ Kirkaldie v Information Commissioner & Thanet District Council [EA/2006/0001], para. 21.

⁵ Bellamy v the Information Commissioner & the Secretary of State for Trade and Industry [EA/2005/0023], para. 9.

76. In the Commissioner's view the information clearly attracts legal professional privilege and so the next thing to consider is whether disclosure would adversely affect the course of justice. As the Commissioner has already discussed, this case is still live and at the contested stage of proceedings. Ofgem has said that there is a very real prospect of a statutory appeal to the court. Disclosure would clearly be damaging to Ofgem's position given that it discusses various different enforcement options and strategies and also discusses the strengths and weaknesses in Ofgem's case. Disclosure would adversely affect its ability to defend its position and also its ability to take enforcement action under the Advanced Meter Obligations against other energy providers. There is a separate adverse effect in that disclosure of information would undermine the principle of legal professional privilege and the administration of justice.
77. The Commissioner is satisfied that disclosure of the legal advice contained within document 15 and 21 would adversely affect the course of justice and consequently regulation 12(5)(b) is also engaged on this basis for this specific information.

Public interest test

78. In considering the public interest test the Commissioner has taken into account the arguments for disclosure and for maintaining the regulation 12(4)(e) exception which she has discussed in length above and which apply equally here.
79. The withheld information relates to a live and ongoing investigation. Disclosure would make it that much harder for Ofgem to undertake its investigation as efficiently as possible, free from distraction and outside interference. The Commissioner is satisfied that disclosure would prejudice Ofgem's position in that the complainant would be given an advantage should Ofgem become the subject of a legal challenge.
80. The fact that the investigation was live at the time of the request means that disclosure would adversely affect Ofgem's ability to carry out enforcement activities effectively both in terms of this investigation and future investigations. Disclosure would allow the complainant access to Ofgem's internal communications on the strengths of its case which would make it harder for Ofgem to settle the case as well as placing them at a serious disadvantage in any future litigation. Disclosure would also reveal Ofgem's approach to investigations as well as the basis on which it might be prepared to take enforcement action in similar cases. The Commissioner takes the view that there is a significant public interest in allowing Ofgem to undertake its regulatory responsibilities efficiently and effectively.

81. For the Installation Rate Data there is a particularly strong public interest in maintaining the prospect of enforcement action to encourage energy providers to meet their Advanced Meter obligations to the fullest extent. It would not be in the public interest if enforcement action became more predictable or if energy providers became complacent in their obligations.
82. The Commissioner has also given some weight to Ofgem's argument about not discouraging licensees from responding in an open and transparent way to its investigations. The Commissioner accepts that Ofgem has statutory powers to request information but she also accepts that the public interest is served by regulators being able to receive information voluntarily and with the cooperation of the organisations it regulates as this is a far more efficient way of undertaking investigations and inquiries. Disclosure would lead to Ofgem having to use greater resources in its investigations and this would not be in the public interest.
83. For these reasons the Commissioner is satisfied that the public interest in maintaining regulation 12(5)(b) strongly outweighs the public interest in disclosure.
84. There are also additional arguments for withholding the two documents containing legal advice and so the public interest in withholding this particular information is even stronger.
85. In balancing the public interest the Commissioner's view is that there is an inbuilt public interest in withholding information which is subject to legal professional privilege. Therefore, the Commissioner's approach, backed by successive tribunals, is to afford an initial weighting in favour of maintaining the exception. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the principle behind LPP, i.e. safeguarding openness in all legal communications to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
86. As well as the inherent public interest in the principle of legal professional privilege the Commissioner will also take into account the particular circumstances of the case. For instance, where the information is live or recent there will be an even stronger case for withholding the information. In this case the legal advice was still live and there was a very real prospect of litigation. Furthermore, the advice was only a few weeks old at the time of the request. Disclosure at this point would clearly be unfair to Ofgem in that it would give one party an advantage in any potential legal proceedings. It would reveal the

strengths and weaknesses of its position and therefore prejudice its investigation into the complainant's compliance with the Advanced Meter Obligations as well as similar investigations in future.

87. In the absence of any compelling arguments for disclosure the Commissioner finds that the public interest strongly favours maintaining the regulation 12(5)(b) exception in respect of documents 15 and 21.

Regulation 12(3) – Personal data

88. Ofgem has withheld the information in document 14 under regulation 12(3). Regulation 12(3) provides that to the extent that requested information includes personal data of someone other than the applicant, it should not be disclosed except in accordance with regulation 13. So far as is relevant here, Regulation 13 provides that information shall not be disclosed if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. There is no public interest test to apply.
89. In this case Ofgem has said that disclosure would contravene the first principle which requires that personal data be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions listed in Schedule 2 of the DPA can be satisfied.
90. In deciding whether regulation 13 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

91. The withheld information in document 14 comprises a list of attendees at the Settlement Committee meeting of 19 August 2016. The individuals can obviously be identified from this list and so the Commissioner is satisfied that it is clearly personal data.
92. The next thing to consider is whether disclosure of the requested information would contravene the first data protection principle. The

Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.

93. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the ICO takes into account a number of factors, including the following:

- What reasonable expectations does the individual have about what will happen to their personal data?
- What are the consequences of disclosure?
- Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject?

94. Ofgem explained that the individuals whose names have been withheld are all junior civil servants (i.e. below the Senior Civil Service) and that in its view the staff members concerned would not have a reasonable expectation of disclosure. It referred to the Commissioner's guidance on requests for personal data about public authority employees:

*"In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed."*⁶

95. The same guidance refers to The First-tier Tribunal case of Alasdair Roberts v the Information Commissioner where it found,

96. *"In general terms we think that a senior civil servant (by which we mean someone at Grade 5 or above) would not have a reasonable expectation of anonymity in respect of any document, even one with sensitive content (although even then there may be an occasional exception). At the more junior levels we think that anonymity is a reasonable expectation although that expectation may lessen with increasing*

⁶ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

seniority and be influenced by the extent to which he or she occupies a public facing role.”⁷

97. Having reviewed the withheld information and having considered the circumstances of this case the Commissioner is satisfied that the individuals concerned are junior civil servants who appear to be in non-public facing roles. As such they would have a reasonable expectation of anonymity and therefore disclosure would be unfair.
98. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedom of the data subject.
99. In this case Ofgem explained that the complainant had been told of the names of the actual Settlement Committee decision-makers in advance of the meeting and had been informed subsequently of the names of the Senior Civil Servants who attended the meeting. In light of this the Commissioner sees very little to be gained by disclosing the names of junior officials who would not have been formally responsible for the decisions taken in respect of the investigation. In the Commissioner's view any legitimate interests in disclosure are outweighed by the legitimate interests in protecting the rights and freedoms of the data subjects and therefore the regulation 13 exception is engaged.

Other exceptions

100. The Commissioner is satisfied that all of the withheld information is exempt from disclosure under regulation 12(4)(e) and regulation 12(5)(b) or regulation 13 in the case of document 14. Therefore she has not gone on to consider whether any of the other exceptions relied on by Ofgem might also apply.

⁷ Alasdair Roberts v The Information Commissioner and the Department for Business Innovation and Skills, [EA/2009/0035], para. 25.

Right of appeal

101. 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

102. 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.

103. 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF