

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2019

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

Address: 9 Millbank
London
SW1P 3GE

Decision (including any steps ordered)

1. The complainant submitted two requests to Ofgem for emails received by the Chief Executive and the Director of Conduct and Enforcement during a specific time period in February 2019. Ofgem refused the requests citing section 14(1) of the FOIA (vexatious requests) as its basis for doing so. Ofgem claimed that section 14(1) applied because compliance with each request would constitute a grossly oppressive burden.
2. The Commissioner's decision is that Ofgem was not entitled to rely on section 14(1) of the FOIA to refuse the requests.
3. The Commissioner requires Ofgem to take the following step to ensure compliance with the legislation.
 - Issue fresh responses to the requests which do not rely on section 14(1) of the FOIA.
4. Ofgem must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 March 2019, the complainant wrote to Ofgem and submitted the following two requests for information:

Request one

"I would like to request a copy of all of emails received by Chief Executive Dermot Nolan in February 2019"

Request two

"I would like to request a copy of all of emails received by Anthony Pygram, Director of Conduct and Enforcement, during the month of February in the year 2019."

6. Ofgem responded to the requests separately on 8 and 9 April 2019. It refused both requests, citing section 12 of the FOIA (cost of compliance). It suggested that the complainant could refine his requests so that they could be dealt with under the appropriate limit.
7. On 10 April 2019 the complainant wrote to Ofgem to refine the scope of both requests by limiting the time frame for each to *"just the last three days of February"*.
8. On 8 May 2019 Ofgem contacted the complainant to advise that it held the requested information but it considered the requests would likely engage section 14(1) of the FOIA (vexatious requests) due to the burden on its resources. It attempted to assist the complainant to narrow the scope of his requests and suggested that he could focus them by identifying a particular subject matter he was interested in.
9. However, on 11 May 2019 the complainant confirmed he would not narrow the scope of the requests any further.
10. Ofgem provided its final response to the requests of 10 April 2019 together on 13 May 2019. It refused the requests citing section 14(1) of the FOIA.
11. On 14 May 2019 the complainant requested an internal review of both requests. Ofgem provided the internal review outcome on 28 May 2019, in which it maintained its original position.

Scope of the case

12. The complainant contacted the Commissioner on 28 May 2019 to complain about the way his requests for information had been handled. He disputed Ofgem's decision to refuse his requests as vexatious.
13. The scope of this case and the following analysis is the determination of whether the Council correctly refused to comply with the requests under section 14(1) of the FOIA. In particular, whether Ofgem has made a reasonable assessment of the burden each request would impose and whether such a burden would be grossly oppressive in the circumstances.

Reasons for decision

Section 14(1) – Vexatious requests

14. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
15. The term vexatious is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield¹. The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure.*" The Tribunal's definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
16. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
17. The Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by Ofgem in this case.

¹ <https://www.judiciary.uk/judgments/info-commissioner-devon-county-council-tribunal-decision-07022013/>

18. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:

- The requester has asked for a substantial amount of information **and**
- The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
- Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

Ofgem's position

19. Ofgem confirmed that while it handled the refined requests together it had considered them individually based on their own merits. Ofgem did not consider that the requests were clearly vexatious in the more normal sense, rather it asserted that each of the requests placed a grossly oppressive burden on it.

20. Ofgem confirmed that, for the three days in question, it identified 201 emails received by Mr Nolan and 278 received by Mr Pygram. It explained that the emails related to a broad spectrum of subject matter, as might be expected in the context of the work carried out by them as senior staff members of the economic regulator with responsibility for the gas and electricity markets. This included internal, external and personal correspondence.

21. Ofgem conducted a sampling exercise for each request. For both, its approach to selecting the sample of emails was:

"a) Random Emails: These were selected randomly from both Mr Nolan's and Mr Pygram's inboxes from the period 26th-28th February 2019. Specifically, from each inbox every 15th email (#1, #16, #31, #46 etc.) was selected. Selecting every 15th email from the inboxes ($1/15 \times 201$ and $1/15 \times 278$) produced, when rounded up to the nearest whole number, respectively, 14 emails (Mr Nolan) and 19 emails (Mr Pygram);

and

b) Representative Emails: A further 16 emails were selected from Mr Nolan's inbox and a further 22 emails from Mr Pygram's inbox (numbers reflecting the fact that the latter inbox is 1.38 larger numerically than the DN one) subject to the following criteria:

- (i) *Ensure, respectively, we have, respectively, at least 5 emails and at least 7 emails from each of 26th, 27th and 28th February 2019: and*
- (ii) *The 16 and 22 emails should include least two emails from each of the following categories of emails received:-*
- *Personal*
 - *Management*
 - *Staff/Recruitment*
 - *Enforcement/Ofgem Litigation*
 - *Policy formation/discussion*
 - *External regulatory/official correspondence - in/out/draft*
 - *External commercial/advertising correspondence -in/out*
 - *Ofgem/GEMA Committees/Processes/Reporting*

This sampling approach involved looking at, respectively, 30 and 41 emails.”

22. Ofgem provided the Commissioner with a detailed breakdown of the time spent on retrieving emails, deciding whether exemptions applied and making appropriate redactions for each request.
23. In relation to the request for Mr Nolan’s emails it estimated it would take three hours and 21 minutes to retrieve the emails, five hours and 40 minutes to decide whether exemptions applied and 11 hours and 24 minutes to carry out redactions.
24. In relation to the request for Mr Pygram’s emails it estimated it would take four hours and 38 minutes to retrieve the emails, 9 hours to decide whether exemptions applied and 7 hours and 21 minutes to carry out redactions.
25. Additionally, Ofgem said that given the subject matter of some of the emails, it would be necessary to organise any requisite consultation prior to effecting any possible disclosure. It advised the Commissioner of three instances it expected this would be required for. Firstly, where any disclosure involves documentation discussing development of policy. Secondly, where data has been obtained from a regulated party under Ofgem’s regulatory processes. Thirdly, in relation to personal data relating to staff or third parties. It proposed that an extra hour was

added to the handling time for each request for this consultation exercise.

26. Ofgem anticipated each request would require over 20 hours of work. Specifically, regarding the request for Mr Nolan's emails, Ofgem estimated the total time to prepare the requested information for disclosure was 21 hours and 25 minutes, and with regard to the request for emails received by Mr Pygram it estimated the total time was 21 hours and 58 minutes.
27. Based on the sample of information it had reviewed, Ofgem told the Commissioner that it expected the following exemptions to apply:
 - Section 31 (law enforcement) – in relation to regulatory and enforcement activity undertaken by Ofgem
 - Section 36 (prejudice to effective conduct of public affairs)
 - Section 40 (personal data) – relating to staff members, consumers and others
 - Section 41 (information provided in confidence)
 - Section 42 (legal professional privilege)
 - Section 44 (prohibitions on disclosure) – including section 105 of the Utilities Act 2000.
28. It stated that the sampling exercise demonstrated that the potentially exempt information was likely to be scattered throughout the requested material. Therefore, staff would be required to manually look at every email, regardless of its subject matter, to see whether the information was exempt and carry out any necessary redactions.
29. When considering the effect of these requests, Ofgem believed it was relevant that the requester's aims and motivations, together with any wider value or public interest, were unclear. It highlighted that it sought to engage with the complainant to narrow the scope, or focus the aims, of the requests but he declined to engage in this process. Ofgem said that the requests had the characteristics of a "*fishing expedition*", where a request is made in the hope of catching information that may be of interest. It also said that while the complainant had narrowed the scope of the request by limiting the time period, the dates selected appeared random.
30. Ofgem stated that the requests would impose a significant burden by obliging Ofgem to sift through a substantial volume of material,

including material of a limited value. It believed that this was indicative of the vexatious nature of these requests.

The Commissioner's decision

31. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. She strongly recommends that any public authority whose main concern is the cost of finding and extracting the information to consider the request under section 12 of the FOIA, where possible.
32. Under section 12(1) of the FOIA public authorities can refuse a request if it would cost more than a set limit to find and extract the requested information. For Ofgem this limit would be 18 hours of work.
33. A public authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information. Instead, it may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden.
34. When reviewing Ofgem's sampling exercises, the Commissioner considers that Ofgem has allowed an unnecessary amount of time in its estimations for retrieving the emails, as it is not clear why this would be anything other than a straightforward task. Without an explanation on this point, it is not clear why identifying all emails within the scope of the request would take the estimated times stated at paragraphs 23 and 24 above. In any case, this activity would be covered by section 12 and should not be included in any estimates when refusing a request under section 14(1). The Commissioner notes that without including this activity the estimates are reduced to 18 hours and 4 minutes for the request regarding Mr Nolan's emails, and 17 hours and 20 minutes for the request regarding Mr Pygram's emails.
35. As noted above, the Commissioner believes that the threshold for refusing a request on the ground of the burden it would impose is high. Her published guidance² states that "*the bar for refusing a request as 'grossly oppressive' under section 14(1) is likely to be much higher than for a section 12 refusal.*"

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

36. Following this approach the Commissioner's view is that, in relation to any information request, 17 or 18 hours of work would not be considered to be grossly oppressive. Even if considering the combined total of the time taken to review and prepare the information within the scope of the two requests being considered in this notice, 35 hours and 24 minutes of work is likely to be, at most, at the lower end of the scale of what may be considered grossly oppressive.
37. Given the requests are for emails received by the Chief Executive and the Director of Conduct and Enforcement, the Commissioner accepts that Ofgem's concerns about potentially exempt information being caught by the requests are legitimate ones. The Commissioner agrees that complying with the request would require Ofgem to spend time on considering and applying exemptions. However, it is important to keep in mind that all information requests will impose some burden and public authorities must accept this in order to meet their underlying commitment to transparency and openness.
38. The Commissioner is not satisfied that Ofgem has demonstrated that the burden of these requests can be accurately characterised as grossly oppressive. While potentially exempt information is likely to be scattered throughout the requested emails and require a manual review, the Commissioner does not believe this would impose an unreasonable burden on Ofgem for either request.
39. The Commissioner is not persuaded that the requests would impose a grossly oppressive burden on Ofgem. She therefore finds that the requests do not engage section 14(1). At paragraph 3 above, Ofgem is now required to issue fresh responses to the requests that do not rely on section 14(1).

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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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