

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2024

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

Address: 10 South Colonnade
Canary Wharf
London E14 4PU

Decision (including any steps ordered)

1. The Commissioner's decision is that Ofgem is entitled to withhold the requested information about an Independent Distribution Network Operators licence under section 44(1) of FOIA as there's a prohibition on its disclosure. It's not necessary for Ofgem to take any corrective steps.

Request and response

2. The complainant made the following information request to Ofgem on 8 September 2023:

"...in more than one email from Ofgem, the position is maintained, that Ofgem cannot disclose information about an application, other than to the Applicant.

This is an issue, entirely distinct from the Freedom of Information requests for copies of documents. If Ofgem is to retain this stance, please guide me as to the statutory authority on which Ofgem seeks to rely. I am not aware of any authority, which precludes Ofgem from giving to interested parties, simple information as to the stage reached in processing an application, and the anticipated time period for processing.

Further to my email yesterday, I have now seen a copy of an email, issued by a different department at Ofgem, which suggests a new public consultation is imminent. That would be consistent with the filing of an alternative application for a transmission licence, which was implied in the email received from you on 10 August.

I would be most grateful, if you can clarify by return:

- a) Has the application for an IDNO been withdrawn;
- b) Has the application for an IDNO been rejected;
- c) Has the application for an IDNO been refused;
- d) Does the application for an IDNO remain pending?
- e) If still pending, is the application under active consideration;
- f) If still pending, has the process of consideration of the application been suspended or deferred;
- e) If under active consideration, please provide an assessment of the period before determination;
- f) If suspended, or subject to a moratorium, please confirm the period of deferment;
- g) Has the applicant filed a new application for a transmission licence
- h) If so, please confirm the date of filing, and the likely commencement date for the requisite period of public consultation.
- g) Has the application for an IDNO been amended in order to proceed as an application for a distribution licence.

The application filed for an IDNO, coupled with references made by the Applicant Company in respect of compulsory entry onto land, has caused a great deal of stress and anxiety, mixed with intensity and alienation, and therefore simple information from Ofgem, could help towards defusing this. The application, and its progress and determination, is hugely significant for the Communities addressing the proposals of the Applicant Company.”

3. Ofgem’s final position is that the requested information is exempt from disclosure under section 44(1) of FOIA. Ofgem advised that section 105 of the Utilities Act 2000 prohibited it from disclosing this information.

Reasons for decision

4. This reasoning focusses on whether Ofgem is entitled to withhold the requested information under section 44(1) of FOIA.
5. Section 44(1)(a) of FOIA says that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption and isn’t subject to the public interest test.

6. In its response to the request, Ofgem advised the complainant that section 105(1) of the Utilities Act 2000 prohibited it from disclosing the information the complainant has requested.
7. Section 105 of the Utilities Act says that information which has been obtained under or by virtue of the Act and relates to the affairs of any individual or any particular business shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on. As such, section 44(1) applied.
8. In their request for an internal review, for each of their 11 questions the complainant presented an argument for why section 44 didn't apply. This centred on section 105 not permitting or requiring "that Ofgem conceal whether an application previously filed under or pursuant to the 1989 [Electricity] Act, has now been withdrawn" and that section 105 didn't stop Ofgem from answering with a simply "Yes" or "No".
9. Ofgem is a creature of statute. It was formed under the Utilities Act and performs functions under the Electricity Act, Gas Act and various legislation. It's entitled to withhold any information that comes into its possession for the purposes of performing its regulatory functions listed under section 105(1)(a) of the Utilities Act.
10. The Commissioner is satisfied that Ofgem holds the information the complainant has request by virtue of its statutory functions.
11. The Utilities Act 2000 provides gateways for lawful disclosure, but the Commissioner doesn't consider that any of these gateways have been met. In any case, these gateways provide a power to disclose, not a duty to disclose.
12. The Commissioner has discussed gateways to disclosure at more length in this decision in a similar case: IC-255419-N3J5¹.
13. The Commissioner's decision is that Ofgem correctly applied section 44(1) of FOIA to the disputed information in the current case because the Utilities Act prohibits Ofgem from disclosing it.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027521/ic-255419-n3j5.pdf>

Right of appeal

14. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

15. 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.
16. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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