

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 March 2024

**Public Authority:** Ofgem  
**Address:** 10 South Colonnade, Canary Wharf, London, E14 4PU

#### **Decision (including any steps ordered)**

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1. The complainant made a meta request to Ofgem for the information it held that had led the officer/Ofgem to reach a decision that section 30 of FOIA applied to an earlier request they had made. Ofgem interpreted the request incorrectly but during the Commissioner's investigation it rectified this and disclosed some information to the complainant. It withheld the remainder under sections 40 and 42 of FOIA.
2. No complaint was made about Ofgem's application of section 40 of FOIA. The Commissioner's investigation therefore focused on Ofgem's application of section 42 of FOIA and any procedural breaches of FOIA in terms of how the request was handled.
3. The Commissioner's decision is that Ofgem is entitled to refuse to disclose the remaining withheld information under section 42 of FOIA. He has however found Ofgem in breach of sections 1, 10 and 17 of FOIA.
4. The Commissioner does not require further steps to be taken.

#### **Request and response**

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5. On 27 June 2023, the complainant wrote to Ofgem and requested information in the following terms:

“Please provide information known to the Information Rights Officer who responded to FOI request FOI2023/01361 that leads them or Ofgem to believe that provision of the information of the type requested under either item of the FOI request would or would likely to prejudice:

- The Gas and Electricity Markets Authority's ("The Authority") statutory enforcement and regulatory functions; or
- The Authority's ongoing investigations; or
- Ofgem's ability to collect information, for the purposes of determining whether to take regulatory action

To the extent it would not cause the corresponding cost limits under the FOIA to be exceeded, please also provide such information as known to Ofgem's personnel responsible for undertaking internal reviews of FOIA requests such as FOI2023/01361.”

6. Ofgem responded on 24 July 2023. It refused to disclose the requested information citing sections 30 and 40 of FOIA.
7. The complainant requested an internal review on 25 July 2023.
8. Ofgem carried out an internal review and notified the complainant of its findings on 16 August 2023. It upheld the application of sections 30 and 40 of FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 19 August 2023 to complain about the way their request for information had been handled. They stated that they wished to challenge the entire request, except the application of section 40 of FOIA to any personal data, as they are happy for any information which identifies an individual to be excluded.
10. During the Commissioner's investigation Ofgem revised its position a number of times and issued revised responses to the complainant.
11. Before the matter came to the Commissioner Ofgem interpreted the request as asking for the same information that was part of the original FOIA request FOI2023/01361 and for the name of the person who conducts internal review requests. It therefore responded by advising the complainant that the information is exempt under sections 30 and 40 of FOIA. At the beginning of the Commissioner's investigation it revised its position and informed the complainant that their request was

in fact asking for the evidence known to Ofgem when drafting its response to FOI2023/01361, which lead it to believe disclosure of the information requested under that request would be likely to cause the prejudice it claimed. It issued a revised response to the complainant on 6 October 2023 that said that it had undertaken searches and established that it does not hold any recorded information. It also commented that if information was held, what would fall into the second element of his request (information known to those that conduct internal reviews) would be the same as what would fall into the first element.

12. The complainant responded on 9 October 2023 to that revised response, expressing their dissatisfaction with Ofgem's stance that no recorded information is held. They explained that the revised response referred to, for example, previous decisions and similar requests and they felt this information if held would fall in scope. The complainant also highlighted how Ofgem had not to date responded appropriately to the second part of their request and said that it was irrelevant that they had not actually requested an internal review in relation to FOI2023/01361. The request was worded so as to obtain any information internal review handlers would consult or use to conduct internal reviews for information requests such as FOI2023/01361.
13. Ofgem reviewed the matter again and issued another revised response to the complainant on 15 December 2023. It had now identified recorded information which does fall within the scope of the request and disclosed this to the complainant. It however withheld some information under sections 40 and 42 of FOIA.
14. The complainant considered this further response and advised the Commissioner on 16 December 2023 that they remained dissatisfied and required the Commissioner to consider the following issues:
  - Ofgem had still not issued a substantive response to the second element of their request.
  - Ofgem had applied section 42 of FOIA to some information, but not explained why this applied. They therefore required this information to be disclosed.
  - Ofgem's overall handling of the request and for the Commissioner to record any procedural breaches of FOIA.
15. Correspondence between the Commissioner and Ofgem continued in relation to the withheld information covered by section 42 of FOIA. It was established that yet further recorded information could be disclosed to the complainant. Ofgem therefore issued a third revised response on 8 March 2024 to disclose that additional information. Again it stated that

the remaining withheld information was exempt from disclosure under sections 40 and 42 of FOIA.

16. The complainant wrote to the Commissioner on 10 March 2024. Again there is no complaint over personal data redactions and section 40 of FOIA, only the issues listed above in paragraph 14.
17. The Commissioner will now address each of the three points in turn in the following section of this notice and outline his decision for each.
18. Firstly, the Commissioner is required to document that he has not been provided with a copy of the information withheld under section 42 of FOIA. Ofgem has refused to provide it in accordance with section 51(5)(a) of FOIA.
19. Section 51(5)(a) of FOIA states that an authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act.
20. Ofgem has confirmed that the withheld information is either communications between legal adviser and client for the purposes of giving legal advice or is a summary or quotation of that legal advice, appropriately redacted from the information disclosed to the complainant on 8 March 2024. The legal advice is on the application of exemptions under FOIA and therefore concerns its obligations, rights and liabilities under the legislation.
21. The Commissioner accepts Ofgem's position and that it is not required to provide it to him for the purposes of this investigation. The following section will consider Ofgem's application of section 42 of FOIA based on Ofgem's description of the information and the submissions it has made.

## **Reasons for decision**

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### **The second part of the complainant's request**

22. The complainant is of the view that they have not received a substantive response under FOIA to the second element of their request – this being to know what information an official undertaking an internal review would have when carrying out an internal review for a request similar to their first one.

23. The Commissioner notes that there was initially an interpretation issue and Ofgem read this element of the request as not being relevant because the complainant did not request an internal review for their first request. But it did then provide a brief response to it in its correspondence of 6 October 2023 and said that if information was held it would be the same as the information for the first part of their request.
24. The Commissioner has made enquiries to Ofgem and it has explained how the original officer and an internal review officer would have access to the exact same information when carrying out their functions. The internal review officer would not be privy to any additional information and the purpose of the internal review is to review the original officer's response and how that was made. It confirmed that the information subsequently located and disclosed covers all aspects of the request – this is the information that both the officer and an internal review officer would have consulted if an internal review had been carried out about this request or similar.
25. It is understood however that this was not made clear in subsequent responses to the complainant. But despite this no further action is required.

## **Section 42 – legal professional privilege**

26. Section 42 of FOIA states that information is exempt from disclosure if it is subject to legal professional privilege (LPP).
27. Ofgem has confirmed that the withheld information is either direct communications between legal adviser and client in respect of Ofgem's requirements and liabilities under FOIA or is information contained in other communications, which directly quote or summarise that legal advice.
28. For the reasons explained in paragraphs 19 to 21 above, the Commissioner is not able to review the withheld information on this occasion, as it is subject to section 51(5)(a) of FOIA. However, he is satisfied from the submissions he has received from Ofgem that the remaining withheld information is subject to advice privilege and therefore LPP. Section 42 of FOIA is therefore engaged.

## **Public interest test**

29. Ofgem stated that while there may be a public interest in seeing private communications between Ofgem lawyers and clients and the contents of legal advice, it is their view that there is a stronger public interest in maintaining privilege in the regulator's lawyer/client advice. It commented that there might be very considerable jeopardy to the Gas

and Electricity Markets Authority (GEMA), were such material disclosed. It stated that it could render Ofgem unable to effectively and lawfully carry out its functions if such advice were to be seen, anticipated and second-guessed by third parties.

30. Ofgem also argued that there would be prejudice internally to GEMA's and Ofgem's ability to act effectively and externally – including to energy consumers whose interests are protected under GEMA's overriding objectives set out at section 3A of the Electricity Act 1989, and whose interests would be adversely affected if GEMA was not able to enforce cases or to carry out other functions effectively.
31. Ofgem confirmed on balance that it considers the public interest in withholding the information, protected by LPP, strongly outweighs the public interest in disclosure. It referred to the Commissioner's guidance and how that recognises the strong public interest in safeguarding openness in all communications between client and lawyer to ensure free and frank legal advice.
32. The complainant believes the public interest rests in disclosure and refers to correspondence they have obtained which they believe discloses the substance of the legal advice obtained to the public. They refer to an email dated 26 June 2023 which states that the author's initial reaction was to not disclose the requested information, but the conflicting advice they received then led them to write up two responses – one for disclosure and one for non-disclosure. The complainant believes that this conflict means that the public interest rests in disclosure.
33. The Commissioner recognises the public interest in openness, transparency and accountability and in members of the public gaining access to information, which will aid their understanding of a particular decision. In this case disclosure would reveal what legal advice Ofgem received in relation to the complainant's earlier request and give the complainant more insight into why Ofgem reached the decision that it did. More broadly it would give an insight into Ofgem's thoughts around FOIA and its requirements and obligations under that legislation.
34. However, in this case the Commissioner considers the public interest rests in maintaining the exemption. There are strong public interest arguments in favour of protecting the long standing principle of LPP and the ability of public authorities to obtain free and frank legal advice. Such advice is required to enable them to operate effectively and efficiently and ensure that all potential options are considered in a given situation and the most appropriate decision made. Disclosure would hinder Ofgem from doing that.

35. The Commissioner disagrees with the complainant with regards to the correspondence they have received. The email in question does not reference, quote or summarise any of the legal advice Ofgem obtained. It refers to a potential conflict of views but this happens in various scenarios, including FOIA and this does not then suggest that the legal advice obtained should be disclosed into the public domain. Ofgem's final decision in relation to the complainant's earlier request was communicated to them. They had the right to request an internal review and then refer the matter to the Commissioner under section 50 of FOIA for an investigation. This would be the appropriate channel in which to challenge a FOIA decision not seeking public disclosure of information protected by LPP.

### **Procedural matters**

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36. The Commissioner finds Ofgem in breach of sections 1 and 10 of FOIA. It failed to disclose information to which the complainant was entitled within 20 working days of receipt. This is because it misinterpreted the request, then advised that it did not hold information and then revised its position again and confirmed that it does in fact hold information falling in the scope of the request. Some of this information was disclosed to the complainant and had the correct interpretation been taken from the outset and appropriate searches undertaken, the complainant would have received this information much sooner.
37. The Commissioner has also recorded a breach of section 17 of FOIA, as Ofgem issued two incorrect refusal notices to the complainant before it issued the correct one outlining the correct decision. The last refusal notice (which was based on the correct interpretation) also failed to explicitly address the second part of the request and confirm that the information identified, disclosed and withheld was the recorded information Ofgem holds for both parts of the request.

## Right of appeal

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38. 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](mailto:grc@justice.gov.uk)

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**