

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 16 October 2024

**Public Authority:** Office of Gas and Electricity Markets  
**Address:** 10 South Colonnade  
Canary Wharf  
London  
E14 4PU

**Decision (including any steps ordered)**

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1. The complainant has requested copies of all documentation and correspondence concerning evidence submitted by their client for an application to the Non-Domestic Renewable Heat Incentive (NDRHI) Scheme. The Office of Gas and Electricity Markets ('Ofgem') provided some of the requested information but applied redactions relying on regulation 13 of the EIR (third party personal information).
2. The Commissioner's decision is that Ofgem was entitled to rely on regulation 13 of the EIR to withhold some of the requested information. He also finds that, on the balance of probabilities, Ofgem does not hold any further information relevant to the request and has complied with regulation 5(1) of the EIR.
3. The Commissioner does not require further steps.

**Request and response**

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4. On 6 December 2023, the complainant wrote to Ofgem and requested information in the following terms:  
  
"I have reviewed the exchange of emails you have had with [NAME REDACTED] (chronologically ordered in the attached) but I fear there might be some missing; please advise and send me copies of all

correspondence (including attachments) you have had regarding this account. On a similar vein, to assist my understanding of the situation, [NAME REDACTED] requested copies of ALL documentation (photos, pdfs, spreadsheets etc; ) provided at both accreditation AND subsequently. For example, the documents sent by your colleague [NAME REDACTED] on 5th December do not include any of the Amendment documentation (x2), spreadsheets of the agreed meter reading estimations, updated IRMAs, etc; I have copied in 'RHI.enquiry' but perhaps you can prompt them to supply ALL the documents and correspondence so that I can review the situation properly."

5. Ofgem responded on 8 January 2024 and provided a link where redacted copies of the requested information could be downloaded. It advised that it had redacted some of the information within the document copies as it related to personal information.
6. The complainant wrote to Ofgem on 24 April 2024 and 9 May 2024 to express their dissatisfaction with the redactions applied to the disclosed documents. They stated that the redactions made it difficult to see the chronological order of the documents and they believed that further information was held within scope of the request.
7. Following an internal review, Ofgem wrote to the complainant on 21 May 2024. It stated that it had identified more information within scope of the request, and provided further redacted information. It maintained its application of regulation 13 of the EIR (personal information) to withhold the redacted information.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 2 June 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of his investigation is to determine whether Ofgem was entitled to rely on regulation 13 of the EIR to withhold the redacted information, and whether, on the balance of probabilities, further information was held within scope of the request.

## Reasons for decision

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### Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. As the request is for information relating to renewable energy measures installed at a property, the Commissioner agrees that the requested information is likely to be environmental as per regulation 2(1)(c) and therefore, Ofgem was correct to handle the request under the EIR.

### Regulation 13 – third party personal data

12. Regulation 13 of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than that of the

requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

13. In this case, the relevant condition is contained in regulation 13(2A). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then regulation 13(2A) of the EIR cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

16. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The redacted information in this case relates to names and email addresses of people working at Ofgem as well as employees of the company connected to the NDRHI scheme application.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to an individual or individuals.
22. The Commissioner is therefore satisfied that the information falls within the definition of 'personal data' in section 3(2) of the DPA.

23. The fact that information constitutes the personal data of an identifiable living individual, or individuals, does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

25. Article 5(1)(a) of the UK GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
26. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>1</sup>
29. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

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<sup>1</sup> Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- i. Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii. Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii. Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

31. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
32. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The complainant has argued that the application process for NDRHI involves the applicant providing certain documentary evidence. The application is often made by a third party (for example, a consultant) and this means that the applicant does not have copies of the original documents supplied to Ofgem, or the iterations that possibly arose up to accreditation. They explained that, after accreditation (which lasts for 20 years), there are occasions where Ofgem may request sight of the application documents even though it should already have records of these.
34. The complainant explained that they did not make the original application but they have been tasked with reviewing and solving any issues connected to the application. They stated that it is therefore vital that they can review the documentary evidence in date-order to understand the situation.
35. The Commissioner is satisfied that there is a legitimate interest in the complainant wanting a comprehensive timeline of the application submissions and subsequent amendments.

### **Is disclosure necessary?**

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The complainant has argued that on previous occasions there has never been a problem with Ofgem providing the applicant with copies of their own documents.
38. In this case the complainant argued that Ofgem have made redactions to hide both their client's details and those of a commercially engaged contractor. They argued that in doing so Ofgem have adulterated their client's files in such a way that they cannot see in which order the documents were created or supplied.
39. Ofgem has explained that it did not redact any information relating to dates or document versions. It explained that it redacted third party personal information but did not redact the personal information of the complainant and their manager as they were 'joint requesters' for the information.
40. The Commissioner has viewed the withheld information and is satisfied that the redactions have only been made to the names and email addresses of third parties. He cannot see evidence of dates being removed from the versions provided to him.
41. The Commissioner notes that the redactions applied to the requested information are minimal. He notes that even though names have been redacted from the documents and email addresses, the relevant departments and email domain names have been disclosed. He notes the complainant's concerns that they may be required to provide copies of some of the documents at a later stage, but he does not see how the redacted names and email addresses would prevent this.
42. The Commissioner understands the complainant's reasons for wanting complete and unredacted copies of the requested information. However, he is mindful that disclosure under the EIR is to the world at large and it is therefore necessary to prevent the improper disclosure of personal information.
43. The Commissioner notes that, in its internal review response, Ofgem asked the complainant to identify the documents where they felt information about the date of submission or creation had been compromised so that it could check these.



44. The Commissioner is satisfied in this case that it is not necessary for Ofgem to disclose the redacted personal information in order to satisfy the request.
45. The Commissioner therefore considers that as disclosure is not necessary, no lawful basis exists for the processing that would take place to facilitate disclosure and it is unlawful. It therefore does not meet the requirements of principle (a).
46. The Commissioner's decision is that Ofgem is entitled to withhold the requested information under regulation 13(1) of the EIR, by way of regulation 13(2A)(a).

### **Regulation 5 – duty to provide environmental information on request**

47. Regulation 5 of the EIR requires that a public authority that holds environmental information shall make it available on request. This is subject to any exclusions or exceptions that may apply.
48. In scenarios where there is some dispute about whether a public authority holds relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
49. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by Ofgem to check that further information is not held, and he will consider any other reasons offered by Ofgem to explain why further information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that further information is not held.
50. The complainant has stated that they believe Ofgem has not disclosed all of the requested information. They also provided the Commissioner with a copy of an email from 2018 that had not been included in the information provided with Ofgem's response or internal review response.
51. Ofgem explained that it searched within its internal NDRHI scheme CRM database. It explained that this is where all information relating to the installation and applicant organisation in this case would be held, as this is automatically uploaded onto the respective account. The searches involved using the RHI reference number on Ofgem's CRM database that it uses to administer all activity on the NDRHI scheme.
52. Ofgem explained that emails, both manual and automated, are sent to NDRHI participants from within the CRM and are all stored there. It added that there is a workflow tool that extracts all documentation from the CRM for a given generating station to help comply with FOI and EIR requests. This includes all the relevant information, including emails and



their attachments. Ofgem explained that it did not conduct further searches as a result.

53. Ofgem explained that it then reviewed the available documents from the database and provided the ones that were in scope of the request. It stated that the scope of the request was for all documents sent to Ofgem for the initial accreditation and amendment of the organisation in question's NDRHI installation.
54. The Commissioner asked Ofgem about the email correspondence from 2018 that the complainant stated was not disclosed as part of its response. Ofgem confirmed that the emails in question were disclosed as part of its response of 8 January 2024. It explained that the emails were included in pages 628-629 of the Accreditation Review document. The Commissioner has reviewed the document and confirmed that the emails were included.
55. The Commissioner notes that Ofgem identified more information in scope of the request at internal review stage. The Commissioner appreciates this may be why the complainant might believe that further information on this matter could be held.
56. However, given the explanations provided by Ofgem about the way the information is held, the searches it carried out and the specific parameters of the request, the Commissioner is satisfied that, on the balance of probabilities, Ofgem does not hold further information in scope of the request.

## **Procedural matters**

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### **Regulation 5(2) – time for compliance**

57. Regulation 5(2) of the EIR states: "Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."
58. As noted above, the complainant submitted their request on 6 December 2023. As part of its internal review response of 21 May 2024, Ofgem disclosed further information and confirmed it was relying on regulation 13 to withhold names and contact details.
59. In failing to address these elements of the request within the statutory time limit, Ofgem breached regulation 5(2).

## Right of appeal

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60. 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)

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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