ico. Information Commissioner's Office

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

Date: **9 December 2019**

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

Decision (including any steps ordered)

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1. The complainant has requested Ofgem to disclose an itemised breakdown of all payments made under the non-domestic renewable heat initiative over the last three years. Ofgem disclosed some information to the complainant but informed him that the remainder is exempt from disclosure under regulation 13 of the EIR. At the internal review stage Ofgem revised its position and informed the complainant that it was refusing to comply with his request in accordance with regulation 12(4)(b) (on the basis of cost).

2. The Commissioner's decision is that Ofgem is entitled to rely on regulation 12(4)(b) of the EIR in this case and that the public interest rests in maintaining this exception. She has however recorded a breach of regulation 9. Although Ofgem has now provided advice and assistance, it failed to do so when it first cited regulation 12(4)(b).

3. The Commissioner does not require any further action to be taken.

Request and response

4. On 26 February 2019, the complainant wrote to Ofgem and requested information in the following terms:

   "…an itemised breakdown of all payments made under the non-domestic renewable heat initiative over the last three years, broken down by year and recipient?

   Please include the following details for each recipient, where known:

   1. Company / Organisation name.

   2. Registration name.

   3. Installation address.

   4. Registered organisation address (if different.)

   5. Amount received in each of the last three years for which information is available.

   6. UK country (England / Wales / Scotland.)"

5. Ofgem responded on 27 March 2019. It disclosed a breakdown of all non-domestic RHI quarterly payments made over the last three years, including the start and end dates for each quarterly period, the amount paid, an abbreviated post code and country. It substituted the RHI reference numbers for random reference numbers, advising the complainant that the true reference and the full postcode is personal data and exempt under regulation 13 of the EIR.

6. The complainant requested an internal review on 27 March 2019. He stated that he was unhappy that the company/organisation receiving the payments had been redacted and the postcode information relating to a company.

7. Ofgem carried out an internal review and notified the complainant of its findings on 28 May 2019. It informed the complainant that it now wished to rely on regulation 12(4)(b) of the EIR on the grounds of cost.

Scope of the case

8. The complainant contacted the Commissioner on 28 May 2019 to complain about the way his request for information had been handled. The complainant is of the view that Ofgem can easily provide the

requested information on companies and simply export it to a spreadsheet with the fields likely to contain personal data removed. He does not therefore consider Ofgem is entitled to rely on regulation 12(4)(b) of the EIR in this case.

9. The Commissioner considers the scope of her investigation to be to determine whether Ofgem is entitled to rely on regulation 12(4)(b) of the EIR on the grounds of cost. She will also consider whether Ofgem complied with the duties outlined in regulation 9 of the EIR and offered the complainant advice and assistance.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

10. Ofgem's position is that the request is manifestly unreasonable on the grounds that to comply with it would impose a significant and detrimental burden on Ofgem's resources, in terms of time and cost.

11. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. A request can be refused as manifestly unreasonable either as it is considered vexatious, or on the basis of the burden that it would cause to the public authority. In this case Ofgem is citing regulation 12(4)(b) due to the burden the request would place on it.

12. The EIR differ from the Freedom of Information Act 2000 (FOIA) in that there is no specific cost limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA.

13. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.

14. Another clear difference is that under the EIR a public authority can take into account the time and cost involved in redacting exempt information. Whereas under FOIA this is not a permittable task when considering section 12 and the Fees Regulations.

15. Regulation 12(4)(b) sets a robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is "manifestly" unreasonable, rather than simply being "unreasonable". The Commissioner considers that the term "manifestly" means that there must be an obvious or clear quality to the identified unreasonableness.

16. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the First-tier Tribunal in the hearing of the Department of Business Enterprise and Regulatory Reform v The Information Commissioner and Platform (EA/2008/0097). The tribunal considered the relevance of regulation 7(1) and commented as follows (paragraph 39):

    "We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be 'to the widest extent possible'. Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."

17. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:

    - Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
    - The nature of the request and any wider value in the requested information being made publicly available.
    - The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
    - The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
    - The presumption in favour of disclosure under Regulation 12(2).

- The requirement to interpret the exception restrictively.

18. Ofgem has said that it is fairly quick and simple to produce an excel document of the requested information from its information management system. The issue is then having to manually check this information to redact personal data under regulation 13 of the EIR.

19. It explained that the RHI scheme is frequently referred to as the "non-domestic RHI scheme". This is to distinguish it from a similar scheme, which is exclusively available to owners or occupiers of single domestic premises. However, it said that it is relevant to this request that under RHI scheme heat may be supported if it is supplied to two or more domestic premises. Or, if the heat is supplied to single domestic premises *and* for other uses (such as also heating business premises, or also used in connection with a process carried out by the participant such as drying or cleaning). It stated that examples of heating installations within the latter category include those providing heat used in farmhouses and farm buildings (such as poultry sheds) and heat that is used in bed and breakfast accommodation.

20. Ofgem additionally explained that any individual RHI scheme participant may be accredited in respect of more than one heating installation – where this is the case, each installation will be the subject of an individual entry in the data set that it maintains. Installations in common ownerships may be located at different premises and are administered using different references.

21. Dealing with names first, Ofgem confirmed that the relevant data set includes 20,980 names. It reviewed 100 names and identified and recorded whether or not they appeared to be those of living individuals. It advised that this exercise took an average of 3 seconds per name, which equates to 17.5 hours in total for all names.

22. This assessment identified 3% that were obviously not living individuals – so those relating to schools, hospitals, some obvious businesses, limited companies and non-profit organisations. It stated that 3% of the 20,980 data set is 629.

23. It also identified 68 biomethane installations which it stated could be excluded from consideration because no biomethane facility would be at a residential address.

24. Ofgem advised that 20,980 minus 68 minus 629 equates to 20,283 and this would be the amount of addresses that would then need to be checked. Ofgem carried out a sampling exercise of 11 entries looking at the addresses of heating installations and scheme participants'

correspondence addresses simultaneously. It pointed out that these two addresses are sometimes the same.

25. It first checked if there is a council tax record for the address using the VOA and SAA website. If that search resulted in records being identified Ofgem assessed the address as relating to domestic premises. These would be redacted. If no council tax record for the recorded address could be identified it then checked whether there is a business rates record for the property, using the same website. If that search resulted in records being identified the address was assessed as not relating to domestic purposes. If there was no council tax or business rates record identified, the entry would need to be marked for further assessment.

26. Ofgem stated that this exercise resulted in an average of 4 minutes and 2 seconds being required to conduct the address checks for participant and installation addresses for each installation reviewed. Given that it would need to check 20,283 entries, it estimated that this task would take 1363 hours and 30 minutes to complete.

27. It would then be faced with another task of reviewing those entries that do have a business rates record where it is not obvious that the entry relates to a limited company. If the entry relates to a soletrader (and it would have to identify those) it, too, would be redacted under regulation 13 of the EIR. No estimate has been provided for this. But the Commissioner does not consider that this is necessary considering the scale of the task and the significant amount of hours that would be involved in the tasks required beforehand.

28. Having considered Ofgem's response and the evidence provided in relation to how the requested information is held and what would be involved in redacting personal data from the various entries, the Commissioner is of the view that complying with the complainant's request would impose an overwhelming and unreasonable burden on Ofgem in terms of time and resource.

29. Ofgem has demonstrated that compliance would take over 1300 hours. The Commissioner considers this is sufficient to demonstrate that the complainant's request is manifestly unreasonable and that regulation 12(4)(b) of the EIR applies. The Commissioner wishes to make the point that even if the estimate is excessive and the time is halved or even quartered, it would still equate to over 650 hours or over 325 hours respectively, both of which would still be considered manifestly unreasonable.

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Public interest test

30. Ofgem stated that it acknowledges the public interest in the provision of this information. It stated that disclosure would provide transparency in relation to the exact identities of recipients of the RHI scheme and the sums they have received.

31. However it considers the public interest rests in maintaining the exception. It stated that a major factor when considering the balance of the public interest test in this case is the sheer amount of work that would be involved in compliance. It has explained how the information is held and what would be required in order to redact personal data from the requested information. Based on its estimate it would take in excess of 1300 hours to comply, which would place an overwhelming and unreasonable burden on Ofgem. It stated that this is not in the wider interests of the public and if it was expected to carry out this level of work in order to comply with one request it would result in resources and time being diverted away from its other functions.

32. Ofgem also referred to the information that is already publicly available relating to the scheme. It stated that a considerable amount of information in relation to the RHI scheme overall, including the cost to the taxpayer, the level of renewable heat that it supports and the associated impact on carbon emissions is already publicly available. It argued that this information provides significant transparency already which allows for informed debate on the measure.

33. The Commissioner considers there is a public interest in transparency and accountability and providing access to information which enables members of the public to understand more clearly how such schemes operate, the cost to the public purse and allow them to assess for themselves whether they are beneficial, sustainable and offer value for money.

34. However, in this case the Commissioner agrees with Ofgem that the public interest rests in maintaining this exception. She considers the overwhelming and unreasonable burden compliance would cause Ofgem outweighs any public interest factors in favour of disclosure. Disclosure would place a significant burden on Ofgem and divert it away from its other functions and this is not in the wider interests of the public.

35. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision Vesco v Information Commissioner (SGIA/44/2019):

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure…" and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

36. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(b) was applied correctly.

Regulation 9 – advice and assistance

37. The application of regulation 12(4)(b) of the EIR triggers the duty to provide advice and assistance in accordance with regulation 9. This means that a public authority should assist the applicant in making a fresh, refined request which could be considered without being a burden in terms of cost so far as it is reasonable to do so. For example, a public authority could suggest narrowing the scope of the request to a particular topic or by timeframe. In some cases it will not be possible for a public authority to provide any advice and assistance of this nature. In these cases public authorities are still expected to inform the applicant of this and why.

38. The Commissioner notes that Ofgem applied regulation 12(4)(b) at the internal review stage but failed to consider regulation 9 and provide appropriate advice and assistance. It has therefore breached regulation 9 of the EIR in this case.

39. However, the Commissioner does not require any further action to be taken now because Ofgem has since rectified this and contacted the complainant to provide appropriate advice and assistance which may enable him to make a refined request in the near future.

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Right of appeal

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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

Samantha Coward
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