Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **5 May 2020**

Public Authority: **Office of Gas and Electricity Markets (Ofgem)**
Address: **9 Millbank**
London
SW1P 3GE

Decision (including any steps ordered)

1. The complainant requested information regarding applications submitted to participate in the Non-Domestic Renewable Heat Incentive Scheme (the scheme). Ofgem refused the request under regulation 12(4)(b) of the EIR (manifestly unreasonable).

2. The Commissioner's decision is that Ofgem was entitled to refuse the request under regulation 12(4)(b). The Commissioner finds that the public interest lies in maintaining Ofgem's application of this exception. She also finds that Ofgem complied with regulation 9 of the EIR (advice and assistance).

3. The Commissioner does not require Ofgem to take any steps.

Request and response

4. On 5 April 2019, the complainant wrote to Ofgem and requested information in the following terms:

> *"Anonymised details of any application to participate in the Scheme which has been granted notwithstanding that the applicant has not submitted a granted planning permission letter or a letter provided*

by the relevant planning authority stating that planning permission is not required".

5. Ofgem responded on 2 May 2019. It refused to comply with the request under regulation 12(4)(b) on the grounds that the request was manifestly unreasonable due to the burden on its resources.

6. On 9 May 2019 the complainant requested an internal review. They stated that it was reasonable to expect Ofgem to have the requested information readily available.

7. Ofgem wrote to the complainant on 5 July 2019 to provide the outcome of its internal review. It maintained its original position, to refuse the request under regulation 12(4)(b).

Scope of the case

8. The complainant contacted the Commissioner on 10 July 2019 to complain about the way the request for information had been handled. They disputed Ofgem's decision to refuse the request as manifestly unreasonable. They believed the information was readily available and that Ofgem had overstated the time required to comply with the request.

9. The scope of the following analysis is to consider whether Ofgem was correct to rely on regulation 12(4)(b) as its grounds for refusing to comply with the complainant's request.

Reasons for decision

Regulation 2 – Is the requested information environmental?

10. Environmental information must be considered for disclosure under the terms of the EIR rather than the FOIA.

11. Regulation 2(1)(c) of the EIR defines environmental information as any information on "*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 [2(1)](a) and (b) as well as measures or activities designed to protect those elements.*"

12. The request in this case is for information relating to a publicly funded scheme of financial incentives that are intended to encourage the use of low-carbon and renewable energy sources in place of fossil-fuels to meet

heating needs. The Commissioner is satisfied that the scheme is a measure that would or would be likely to affect the environmental elements and factors listed in regulations 2(1)(a) and (b). The Commissioner therefore agrees with Ofgem that it was appropriate to consider the request under the terms of the EIR.

Regulation 12(4)(b) – Manifestly unreasonable

13. Regulation 12(4)(b) provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.

14. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious, or where compliance with a request means a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case Ofgem argued the latter and asserted that complying with the request would impose a significant and detrimental burden on its resources, in terms of staff time and cost.

15. Under the EIR there is no specific limit set beyond which a request is considered manifestly unreasonable. This is in contrast to section 12 of the Freedom of Information Act 2000 (FOIA) under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the "appropriate limit", as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations).

16. The fees regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs it would reasonably expect to incur in:

    - determining whether the information is held;
    - locating the information, or a document which may contain the information;
    - retrieving the information, or a document which may contain the information; and
    - extracting the information from a document containing it.

17. The fees regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour of staff time. Dependent on the sector of the public authority, the appropriate limit is either £450 or £600 which is the equivalent of 18 or 24 hours of work respectively.

18. Although the fees regulations are not directly applicable to the EIR, in the Commissioner's view they can provide a useful point of reference where public authorities cite regulation 12(4)(b) due to the time and cost of complying with a request. However, they are not a determining factor in assessing whether the exception applies.

19. 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.

20. In the Commissioner's published guidance[1] on manifestly unreasonable requests, paragraph 19 states that in assessing whether the cost or burden of dealing with a request is too great, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considers this will mean taking into account all the circumstances of the case including:

    - 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 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; and
    - 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.

21. 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 Information Tribunal in the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Platform (EA/2008/0097) case where the

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

tribunal considered the relevance of regulation 7(1), which provides for a time extension in relation to complex or voluminous requests, 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."*

The complainant's view

22. The complainant in this case is a law firm. They submitted the request for information on behalf of their client, who applied to participate in the scheme in November 2018. Their client's applications were rejected on the grounds that they had not been properly made, specifically due to the absence of adequate planning permission evidence.

23. The complainant told the Commissioner that in correspondence with their client during the application process Ofgem emphasised that evidence regarding planning permission was critical to an application's approval. They believed that this suggested that the requested information was readily available. They did not accept that the request imposed an excessive burden and asserted that Ofgem's estimate was plainly too high.

Ofgem's view

24. By way of background, Ofgem explained that the scheme commenced on 27 November 2011, when the Renewable Heat Incentive Scheme Regulations 2011 (the 2011 Regulations) came into force. The 2011 Regulations were revoked and replaced by the Renewable Heat Incentive Scheme Regulations 2018 (the 2018 Regulations) on 22 May 2018. A legislative requirement for applicants to obtain and provide evidence of planning permission when submitting applications for full accreditation was introduced under the 2018 Regulations. As a result, Ofgem confirmed that all applicants were required to provide evidence from the relevant local authority that planning permission had been granted, or that it was not required.

25. Initially, Ofgem considered that only those applications which were submitted under the 2018 Regulations potentially fell within the scope of the request. It stated that this was because the eligibility criterion for planning permission evidence did not exist under the 2011 Regulations.

26. However, during the course of the Commissioner's investigation, Ofgem confirmed that on an objective reading the request was not confined to those instances where planning permission evidence was required from applicants. It recognised that any application that was approved since the scheme commenced in November 2011 potentially fell within the scope of the request.

27. Ofgem confirmed that 21,707 applications were approved for full accreditation under the 2011 Regulations. Subsequently, up until 9 May 2019 when the request was reconsidered, 258 applications were accepted for full accreditation under the 2018 Regulations.

28. Due to the way this type of information was recorded, Ofgem explained that it would be required to manually review all 21,965 applications to determine whether any fell within the scope of the request.

29. Ofgem told the Commissioner that, given the complex nature of the evidence required to satisfy the eligibility criteria for the scheme, assessments of applications were undertaken by members of staff, as opposed to an electronic system. Likewise, Ofgem confirmed that it was not possible to use technology to extract or filter information regarding planning permission. It confirmed that manually reviewing each application was the quickest method of searching for the information.

30. Firstly, Ofgem considered those applications which were approved under the 2018 Regulations. It explained that applicants were asked to upload their planning permission evidence to a particular slot on the application form, but there was no guarantee that all applicants would do so.

31. When calculating how long it would take to comply with the request Ofgem carried out a sampling exercise. It consisted of the following three tasks:

    - An initial review of each application to determine whether planning permission evidence was present in the correct slot on the form.

    - Where planning evidence was uploaded correctly, a second review to ensure that the evidence related to the heat generating plant for which accreditation was sought.

    - Where evidence was not present in the appropriate slot, further investigation to ascertain whether relevant evidence was provided elsewhere within the application.

32. With regard to the first stage of the sampling exercise, Ofgem tested a sample of 20 applications. On average it took 1.7 minutes to complete this initial review. Extrapolating this for the 258 applications produced a total time of 7.31 hours.

33. Ofgem also confirmed that an initial survey found that, of the 258 applications, evidence was present in the appropriate slot on 208, but on 50 it was not.

34. Ofgem explained that the second stage of the sampling exercise was necessary to ensure the planning permission evidence provided was sufficient to satisfy the eligibility criteria. In some instances the planning documents did not directly refer to the plant and Ofgem stated that in these cases it would need to check the relevant local authority's website.

35. Based on a sample of 10 applications four did not contain evidence which referred to the plant. This stage took an average of 4.75 minutes to complete for each application. Multiplied by the 208 applications where evidence was present in the correct slot, this resulted in a total of 16.47 hours of work for this step.

36. Finally, with regard to the third stage of the sampling exercise, Ofgem estimated that it would take 20 minutes per application. This equated to 16.67 hours to review all 50 applications where evidence was not present in the appropriate slot.

37. In total Ofgem considered it would take 40.44 hours of work to determine whether information was held and locate any such information from the 258 applications approved under the 2018 Regulations.

38. Ofgem then considered the 21,707 applications approved under the 2011 Regulations. It confirmed that there was no specific slot on the form for applicants to provide planning permission evidence, due to the fact that there was no legislative requirement for applicants to provide this information.

39. Similarly to the third stage of the sampling exercise referred to above, Ofgem explained that it would need to manually review each application form and any associated email correspondence in order to determine whether the relevant planning permission evidence was present. In line with the calculations detailed at paragraph 36 above, Ofgem estimated that it would take 20 minutes to review each application, equating to 7,236 hours to review all 21,707 applications.

40. Combining the two estimates, for the applications accepted under the 2011 Regulations and the 2018 Regulations, amounted to a total time estimate of 7,276.44 hours.

41. In its submissions to the Commissioner, Ofgem also considered those applications which had been accepted up until 12 February 2020 in its estimates. However, the Commissioner notes that any applications approved after the request was submitted and originally dealt with by Ofgem in April and May 2019 would not fall within the scope of the request. For that reason, she has not taken that element of Ofgem's estimates into account in this decision notice.

42. As well as providing details of its time estimates Ofgem considered the factors in the Commissioner's guidance, outlined at paragraph 21 above. In terms of the nature of the information and any wider value in it being available to the public it stated:

> *"Anonymised data showing the number of applications that have been approved without proper planning permission evidence would be of limited use to the public as it would not provide any context for those applications. It would not be possible to ascertain what installation the approved application related to, what evidence had been provided, and how Ofgem assessed and made its decision (e.g. whether there was discussion between Ofgem and the applicant that helped elucidate otherwise unclear evidence). The requested information is therefore unlikely to enhance the public's understanding or awareness of environmental issues or the requirements of the RHI scheme in particular.*
>
> *Planning permission applications and decision notices are already available online via local authorities' websites, and the relevant local authority can be determined by searching for the postcode on the government's website. If someone knows the location of a particular installation and wants to know its planning status, then they will be able to retrieve the corresponding planning documents online."*

43. Ofgem also considered the importance of any underlying issue to which the request related and whether the request would illuminate that issue in any way. It stated:

> *"the 2018 Regulations expressly require that applicants obtain planning permission relating to their plant, and Ofgem has express powers to require certain planning permission evidence from applicants. Ofgem's guidance makes clear that, before it will grant accreditation, it will require evidence that planning permission has been granted or that it is not needed, and this evidence must originate from the local planning authority. The application form itself makes clear that this is the evidence that Ofgem asks of all applicants. Accordingly, Ofgem's practice with respect to planning*

permission evidence is already ascertainable by [the complainant] without a response to their information request."

44. Ofgem argued that there were only three members of staff in the relevant team who would be required to deal with the request. Compliance with the request would, therefore, necessitate an extremely significant diversion of resources away from other work.

The Commissioner's decision

45. In reaching a decision the Commissioner considered Ofgem's estimates. She also considered how complying with the request would affect Ofgem and the proportionality of the burden on its workload.

46. Public authorities must interpret requests objectively. They must avoid reading into the request any meanings that are not clear from the wording and must not answer a request based on what they believe the applicant would like or should have asked for.

47. In this case, the Commissioner is satisfied that Ofgem interpreted the request objectively. The request does not specify a particular time frame, or that it is only asking for information regarding applications granted under the 2018 Regulations. Consequently, the Commissioner agrees with Ofgem's position that all applications that were accepted since the scheme commenced potentially fell within the scope of the request.

48. Due to the way the information was held, the Commissioner understands that Ofgem was not able to filter or manipulate the information electronically to determine whether or not applications contained the relevant planning permission evidence. The Commissioner accepts Ofgem's argument that it would be required to manually review over 20,000 applications in order to comply with the request.

49. There is no set limit beyond which a request becomes manifestly unreasonable. However, the Commissioner considers that to spend over 7000 hours to respond to a request is clearly unreasonable. It is the equivalent of one member of staff being diverted to work on the request full time for approximately three and a half years. Furthermore, it significantly exceeds the appropriate limits set under the fees regulations that would apply if the information was not environmental.

50. The Commissioner considers that significant public resources would be required to comply with the request and it would, therefore, place an exceptionally substantial burden on Ofgem. The Commissioner's view is that the request is manifestly unreasonable and she is satisfied that regulation 12(4)(b) is engaged.

The public interest test

51. The public interest test in this case concerns whether the public interest factors in favour of disclosure of the requested information outweigh the public interest in Ofgem not being obliged to use its resources to respond to a request that imposes a manifestly unreasonable burden. Essentially, the Commissioner must assess whether the cost of compliance is disproportionate to the value of the request.

52. Ofgem recognised the inherent importance of accountability and transparency in decision-making within public authorities. However, at paragraphs 42 and 43 above, it argued that the information would be of limited use to the public and was unlikely to enhance public understanding of the scheme.

53. Furthermore, Ofgem argued that its practice with regard to requiring planning permission evidence for any applications submitted under the 2018 Regulations was already evident through the legislation, its guidance and the application form for the scheme.

54. It is the Commissioner's view that there is a strong public interest in not placing a manifestly unreasonable burden on public authorities.

55. The Commissioner's position in this case is that the public interest lies in ensuring that Ofgem's resources are used effectively. She therefore considers that dealing with the request does not best serve the public interest.

56. The Commissioner finds that the public interest lies in favour of maintaining the exception under regulation 12(4)(b).

Presumption in favour of disclosure

57. 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).

58. 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

59. Regulation 9(1) of the EIR states that "*a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*"

60. This regulation places a duty on a public authority to provide advice and assistance to someone making a request. The Commissioner considers that this includes assisting a requester to refine a request if it is deemed that answering it would incur an unreasonable cost. For example, a public authority could suggest narrowing the scope of the request to a particular topic or timeframe.

61. Ofgem argued that it provided sufficient advice and assistance by providing the complainant with details of the calculations used to reach its time estimates in its initial response. It also argued that, in its internal review response, it offered to engage with the complainant further to explore whether any other information or advice and assistance could be provided to satisfy their client's concerns.

62. However, Ofgem acknowledged that there was a particular category of applications it could have informed the complainant about. It told the Commissioner that for a brief period of time in 2018 it granted certain applications that were not accompanied by planning permission evidence that originated from a local authority, but that those applicants provided alternative planning permission evidence instead.

63. The Commissioner's view is that, although it may have been helpful for Ofgem to advise the complainant about this category of applications it was aware fell within the scope of the request, it offered the complainant the opportunity to explore whether the request could be refined at internal review. The Commissioner notes that this offer was not taken up by the complainant.

64. In light of this, the Commissioner concludes that Ofgem complied with regulation 9 of the EIR, by providing reasonable advice and assistance to the complainant.

Right of appeal

65. 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

66. 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.

67. 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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