

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 September 2010

Public Authority: The Office of Gas and Electricity Markets
Address: 9 Millbank
London
SW1P 3GE

Summary

The complainant requested copies of letters exchanged in a twelve month period on the subject of National Grid shared service operations and / or the National Grid Newcastle site between several named individuals. Ofgem refused to disclose the information by virtue of section 44(1)(a) of the Freedom of Information 2000 Act ("the Act"). The public authority argued that section 105 of the Utilities Act 2000 gave it an absolute exemption. The complainant accepts that Ofgem correctly applied section 44(1)(a), therefore this notice only addresses the failure of Ofgem to respond within the statutory time for compliance. The Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 16 July 2009 the complainant requested the following information:

"Any letters exchanged in the last twelve months on the subject of National Grid shared service operations and / or the National Grid Newcastle site, between:

- 1) Yourself and / or Steve Smith (Ofgem managing director of networks) and Steve Holliday, Chief Executive of National Grid*
 - 2) Yourself and / or Steve Smith (Ofgem managing director of networks) and any other director or senior manager at National Grid*
 - 3) any other of your colleagues at Ofgem and either Steve Holliday or any other director or senior manager at National Grid"*
3. Ofgem provided a response to the complaint on 2 September 2009 in which it provided a copy of a letter dated 12 May 2009.
 4. The complainant requested an internal review on 8 September 2009 stating that he felt there would be more correspondence caught by his FOI request as alluded to in the letter which had been provided by Ofgem on 2 September 2009.
 5. Ofgem failed to respond to the request for a review.

The Investigation

Scope of the case

6. Following the outcome of the internal review as detailed at paragraph 11 below, the complainant accepts that section 44 has been correctly applied, he has therefore specifically asked the Commissioner to consider the following points:
 - Ofgem's failure to respond to his initial request within 20 working days.
 - Ofgem's failure to carry out an internal review

Chronology

7. On 30 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. On 2 December 2009 the Commissioner wrote to the public authority reminding it of its obligations under the Freedom of Information Act and asking it to carry out an internal review within a timely fashion as described in the section 45 code of practice.

9. In a letter to the Commissioner dated 21 December 2009, the complaint stated that he was still waiting for a response from Ofgem.
10. On 12 February 2010 the Commissioner wrote to the public authority again, requesting a response within 10 working days.
11. In a letter dated 26 February 2010, Ofgem provided the Commissioner with the result of the internal review it had carried out. The public authority confirmed that it did indeed hold additional information relevant to the original request; however Ofgem refused to release the information by virtue of the exemption contained at section 44 of the Freedom of Information Act 2000.

Analysis

Procedural Requirements

Section 10

12. Section 10(1) of the Act states that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Ofgem provided some of the requested information on 2 September 2009, therefore Commissioner considers that Ofgem has breached section 10(1) of the Act as it failed to provide the information requested within twenty working days following the date of receipt.

Section 17

13. OFGEM failed to issue a refusal notice within 20 working days. The Commissioner therefore also finds OFGEM in breach of section 17(1)
14. The failure of OFGEM to carry out an internal review is addressed in the "Other Matters" section below.

The Decision

15. Ofgem has breached sections 10(1) and 17(1) of the Act in failing to failing to respond within twenty working days following receipt of the request.

Steps Required

16. The Commissioner requires no steps to be taken.

Other matters

17. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 100 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

18. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of September 2010

Signed

**Andrew White
Complaints Resolution Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

Section 10(6) provides that –

"In this section –
"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."