

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2019

Public Authority: Competition and Markets Authority

Address: Victoria House
Southampton Row
London
WC1B 4AD

Decision (including any steps ordered)

1. The complainant submitted a request to the Competition and Markets Authority (the CMA) seeking information about a costs determination it had issued when considering an Energy Code Modification Appeal. The CMA argued that in considering such an appeal it was acting as a tribunal and therefore not subject to FOIA by virtue of paragraph 1ZA of Part 1 of Schedule 1 of FOIA. The Commissioner agrees with the CMA's position and has therefore concluded that it is not a public authority for the purposes of this request.

Request and response

2. The complainant submitted the following request to the CMA on 13 June 2018:

'I read with interest the CMA's cost determination for case EdF/SSE code modification appeal. Please provide me with the total cost figure incurred by GEMA [Gas and Electricity Markets Authority], for this case as it has been redacted from the document published on your website'¹

¹ This request relates to an appeal brought by SSE Generation Limited and EDF Energy (Thermal Generation) Limited (the Appellants) to the CMA against a decision of the Gas and Electricity Markets Authority (GEMA), to reject an industry proposal to modify an industry code for the transmission of electricity. The CMA dismissed the appeal in February 2018. In

3. The CMA responded on 2 July 2018 and explained that it considered the requested information to be exempt from disclosure on the basis of section 32(2) (court records) of FOIA.
4. The complainant contacted the CMA on 3 July 2018 and asked it to conduct an internal review of this response.
5. The CMA informed him of the outcome of the internal review on 29 August 2018. The review explained that the CMA had concluded that it was not required to disclose the requested information but for different reasons to those previously provided:
6. Firstly, the review explained that the CMA was not considered to be a public authority for the purposes of FOIA with regard to the requested information. This was on the basis that FOIA only applies to the CMA only *'in respect of information held otherwise than as a tribunal'*. The CMA explained that the requested information is contained in its determination in relation to the EdF/SSE code modification appeal. In determining that appeal, the CMA argued that it was acting *'as a tribunal'*, on the basis that it was exercising a quasi-judicial role.
7. Secondly, the CMA argued that even if FOIA did apply to the requested information, then it would be exempt from disclosure on the basis of section 32(1)(c) of FOIA which provides an exemption for information held only by virtue of being contained in a document created by a court for the purposes of proceedings in a particular cause or matter. The CMA argued that in hearing the appeal and in producing its published determination on the EdF/SSE code modification appeal, it was acting as a court within the meaning of section 32(4) of FOIA.

May 2018 the CMA issued its costs order requiring the Appellants to pay 75% of GEMA's costs in connection with the appeal. It is this actual amount of these costs that complainant's request is seeking.

Scope of the case

8. The complainant contacted the Commissioner on 3 September 2018. He argued that the CMA *is* a public authority for the purposes of the requested information and furthermore that the information is *not* exempt from disclosure on the basis of section 32 of FOIA.
9. The Commissioner has initially considered whether the CMA is a public authority for the purposes of this request.

Reasons for decision

Is the CMA a public authority for the purposes of FOIA in respect of the requested information?

10. Schedule 1 of FOIA specifies which bodies are considered to be public authorities and thus subject to the requirements of the legislation. Some public authorities are only covered in respect of some of the information which they hold. This is the case with the CMA as paragraph 1ZA of Part 1 of Schedule 1 of FOIA lists it as a public authority in the following terms:

'The Competition and Markets Authority, in respect of information held otherwise than as a tribunal.'

11. Section 7(1) of FOIA states that:

'Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.'

12. The right to request information from a public authority is contained at section 1, Part I of FOIA. Therefore, the effect of these provisions means that information held by the CMA when it is acting as a tribunal is not held by it for the purposes of FOIA. The CMA is therefore under no obligation to disclose such information in response to a request.

The CMA's position

13. The CMA confirmed that the information sought by the complainant was contained in its determination in relation to the Edf/SSE code modification appeal. It argued that in determining that appeal it was acting '*as a tribunal*' on the basis that it was exercising a quasi-judicial function.

14. In support of this position the CMA made the following submissions to the Commissioner:
15. It was clear from wording of paragraph 1ZA of Part 1 of Schedule 1 of FOIA that there are certain functions of the CMA where it is deemed to be acting as a tribunal and certain functions where it does not do so.
16. The CMA explained that it had a range of functions which include considering appeals (such as Energy Code Modification Appeals) against certain decisions by sectoral regulators. In determining such appeals, the CMA argued that it was acting as a tribunal, as such a role was a quasi-judicial one. The CMA explained that this role differs from its other functions, such as the enforcement of consumer and competition law, where it acted in an administrative capacity.
17. The CMA explained that the statutory framework governing Energy Code Modification Appeals is set out in sections 173 to 176 of, and Schedule 22 to, the Energy Act 2004 (the Energy Act). It noted that it has also published rules and guidance governing such appeals, The Energy Code Modification Rules (CC10)² and The Guidance to Appeals in Energy Code Modification Cases (CC11)³.
18. The CMA argued that although the relevant legislative provisions do not explicitly state that it is acting as a tribunal in determining Energy Code Modification Appeals, it is clear from these provisions, as well as its own published rules and guidance, that in determining such appeals it follows a process similar to that of court proceedings and its role is a quasi-judicial one.
19. More specifically, the CMA explained that the appeal process for Energy Code Modification Appeals is framed by the appellant's statement of the case, setting out the grounds for challenge and the facts and evidence relied upon. The CMA explained that the decision maker, ie GEMA, is given the opportunity to respond in writing to the appeal. The CMA then holds hearings with the parties. The CMA explained that it must decide the appeal by reference to specified grounds set out in section 175(4) of the Energy Act, which include whether the decision was based on an error of fact, was wrong in law or failed to properly have regard to or

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284416/cc10.pdf

³ <https://www.gov.uk/government/publications/energy-code-modification-cases-appeals>

give appropriate weight to certain specified matters. Under section 175(6) of the Energy Act, the CMA explained that if it decides the appeal in the appellant's favour, it may quash the decision and remit the matter back to GEMA to reconsider.

20. The CMA drew the Commissioner's attention to the Explanatory Notes to the Energy Act. It noted that these set out that, prior to the introduction of this appeal mechanism that, the only redress available to market participants was to initiate a judicial review of GEMA's decision. The CMA argued that this added further support to the fact that it has taken on a quasi-judicial role in determining these appeals.
21. In summary, the CMA argued that it was clear from the nature of the Energy Code Modification Appeals and the process followed by the CMA in relation to such appeals, as described in the relevant legislation, and the CMA's external rules and guidance, that it acts as a tribunal when determining such appeals for the purposes of paragraph 1ZA of Part 1 of Schedule 1 of FOIA.

The complainant's position

22. The complainant did not provide the Commissioner with any specific arguments seeking to dispute the CMA's position that it was not a public authority for the purposes of this request. However, in his request for an internal review, in which he argued that the section 32 of FOIA did not apply, he suggested that the CMA had misunderstood its role under Section 173 of the Energy Act which is simply to hear appeals against code modification decisions made by GEMA. Under this legislation the complainant argued that the CMA it is acting as the appellate body, i.e. a 'higher' body reconsidering the decision made by a 'lower' body (in this case GEMA). The complainant argued that this does indeed involve inquiry (in terms of the English language meaning of the word) but only in terms of reviewing information and evidence already considered by the 'lower' body (GEMA). In this context the complainant suggested that the word inquiry simply means 'the act of seeking information by questioning', and this should not to be confused with formal powers of inquiry arising from legislation in which the CMA is given powers by Parliament to conduct such an inquiry. The complainant argued that to suggest otherwise would mean the CMA would be in a position to refuse FOI requests for almost all of its work, as the act of questioning is central to its role. The complainant also argued that there was a public interest in the disclosure of the information falling within the scope of his request.

The Commissioner's position

23. The Commissioner has carefully considered the submissions of both parties. Having done so, she is satisfied that in hearing Energy Code Modification Appeals the CMA can be said to acting as a tribunal. The Commissioner acknowledges that the Energy Act does not specifically state that the CMA is acting as a tribunal in such circumstances. However, she is persuaded that the manner in which the CMA hears such appeals, as well as the options open to it in determining such appeals, are ones that are clearly akin to those of a tribunal. That is to say, the appeal is framed by the appellant's statement of the case; the decision maker, ie GEMA, is given the opportunity to respond in writing to the appeal; the CMA then conducts hearings with the parties; the options for the CMA include deciding whether the decision was based on an error of fact, was wrong in law or failed to properly have regard to or give appropriate weight to certain specified matters; and finally having determined the appeal the CMA has the option of concluding an appeal in the appellant's favour or quashing the decision and remitting the matter back to GEMA to reconsider. In the Commissioner's view such a role is clearly one that goes beyond the CMA acting in simply a regulatory or administrative capacity; rather as the CMA has argued it is a quasi-judicial one.
24. It follows that the Commissioner is satisfied that the CMA only holds the requested information by virtue of it acting as a tribunal and therefore it is not a public authority for the purposes of FOIA in respect of the requested information given the effect of paragraph 1ZA of Part 1 of Schedule 1 of FOIA.
25. The Commissioner's notes that the complainant has argued that there is a public interest in disclosure of this information. However, the relative public interest in disclosing requested information is not a factor which can be taken into account when determining whether paragraph 1ZA of Part 1 of Schedule 1 of FOIA applies.
26. In light of the Commissioner's findings above, she has not considered whether the CMA's alternative position, ie that if it was determined to be a public authority for the purposes of this request, then the exemption contained at section 32(1)(c) of FOIA would apply.

Right of appeal

27. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. 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

Jonathan Slee
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Information Commissioner's Office
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