

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 May 2024

**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 correspondence between the Office of Gas and Electricity Markets (Ofgem) and The Times newspaper in February 2023. Ofgem provided some information but withheld other information, citing section 31 – law enforcement, section 44 – prohibitions on disclosure, and section 40 of FOIA – personal information.
2. The Commissioner's decision is that Ofgem correctly cited section 31(1)(g) with subsection 31(2)(c) of FOIA to refuse to disclose the withheld information and that the public interest favoured maintaining the exemption. He has also decided that sections 44(1)(a) and 40(2) of FOIA were correctly cited.
3. The Commissioner does not require further steps.

#### Request and response

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4. On 17 November 2023 the complainant wrote to Ofgem and requested information in the following terms:

“Please can I have a copy of all correspondence you have exchanged with the Times newspaper in February 2023?”

This should include any notes you have made of verbal conversations.

You will be aware I have previously requested this information. I am requesting it again on the advice of the ICO.”

5. Ofgem responded on 14 December 2023 and provided some information. It withheld the remaining information, citing sections 40, 31, 44, and 21 of FOIA.
6. On 16 December 2023 the complainant asked for an internal review because they did not accept that the exemptions cited were correct and believed that the public interest favoured disclosure.
7. Ofgem provided an internal review on 17 January 2024 and maintained its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 13 January 2024 to complain about the way their request for information had been handled.
9. When Ofgem responded to the Commissioner’s investigation letter it withdrew its citing of section 21 of FOIA.
10. The Commissioner considers that the scope of his investigation is to look at whether Ofgem is entitled to rely on sections 31, 44 and 40 of FOIA as a basis for refusing to provide the withheld information.

### **Background**

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11. For context Ofgem explained the following:

“In February 2023, The Times newspaper published allegations into British Gas’ conduct of imposing forced prepayment meter installations on vulnerable customers. Ofgem opened an investigation into British Gas on 2 February 2023<sup>[1]</sup>, and formally published the terms of reference of its investigation into British Gas

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<sup>1</sup> <https://www.ofgem.gov.uk/publications/ofgem-statement-british-gas-prepayment-meter-installations>

Trading Ltd's compliance with its licence conditions on 21 February 2023<sup>[2]</sup>."

## Reasons for decision

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### Section 31 – Law enforcement

12. Section 31(1)(g) of FOIA states that -

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

[...]

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)..."

13. The Commissioner's guidance<sup>3</sup> states that:

"the exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime..."

14. Ofgem explained to the Commissioner that it had identified a number of emails falling within scope of the request and provided the withheld information to him.

15. It also confirmed that it was relying on the purpose set out at section 31(2)(c) of FOIA: "(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise..." The enactment is "section 34 of the Gas Act 1986".

16. Ofgem argued that releasing the requested information -

"...which is directly related to our investigation into British Gas, will prejudice, or is likely to prejudice our function of ascertaining

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<sup>2</sup> <https://www.ofgem.gov.uk/publications/ofgem-approach-investigation-british-gas-trading-ltds-compliance-standard-licence-conditions-slc-slc-0-131-and-d-27-28-and-28b1-gas-and-electricity-supply-licences-announced-2nd-february-2023>

<sup>3</sup> [Law enforcement - section 31 | ICO](#)

whether circumstances which would justify regulatory action in pursuance of the Gas Act 1986 or the Electricity Act 1989”.

It outlined its considerations as -

“a. Firstly, the disclosure of these emails will hinder the Authority’s law enforcement functions. If we disclosed email correspondence demonstrating how we undertake our enforcement activities this would undermine our ability to investigate an organisation’s conduct without the distraction of external influences from other organisations or individuals.

b. Secondly, the disclosure of the information would prejudice our ability to gather information in future investigations. We rely on our relationships with third parties to secure information and evidence as part of our investigations. The parties engage with Ofgem in confidence. If correspondence between Ofgem and third parties relating to an investigation was to be made public, it would discourage parties from communicating with us in an open and transparent manner...This would affect Ofgem’s ability to collect information to facilitate our functions for those areas we have regulatory responsibility under the Utilities Act 2000, Gas Act 1986 and Electricity Act 1989.

c. Thirdly, the disclosure of the information requested would be likely to prejudice our ability to effectively exercise its functions when determining whether any party complies with the law and the circumstances that would justify regulatory action.”

17. Ofgem argued that, “There is a clear causal relationship between disclosure of the information requested...and the prejudice which would occur to Ofgem if the information was disclosed”.
18. Ofgem stated that the prejudice in disclosing the information it has withheld is at the lower level ie ‘it would be likely’ to occur.
19. The complainant was seeking to obtain information about how Ofgem communicates with third parties in the exercise of its functions/powers and information relating to alleged wrongdoing. This could prejudice future investigations. The Commissioner is satisfied that the exemption at section 31(1)(g) provides grounds for refusing to disclose the withheld information as to do so would be likely to prejudice Ofgem’s functions when it is investigating whether it should take action under its regulatory powers as listed in paragraphs 15 and 16..
20. Despite finding that the exemption is engaged, the Commissioner will go on to consider whether the public interest lies in disclosure.

### **Public interest factors in favour of disclosing the requested information**

21. Ofgem acknowledges the benefits in disclosing details of its enforcement work in terms of transparency and accountability.
22. The complainant's view that the public interest lies in favour of disclosure was stated in their internal review request - "given the strong public interest in the subject matter of the Times investigations around that time, and the allegations they have made about the inappropriate use of OfGem's powers".

### **Public interest factors in favour of maintaining the exemption**

23. Ofgem found that the complainant's position "remains unpersuasive". The "substantial public interest is in ensuring that we can conduct and conclude our enforcement investigations fairly, promptly and lawfully."
24. Additionally, disclosing the correspondence "would...undermine public confidence in an efficient and effective law enforcement process" that took "due regard to the rights and expectations of parties concerned" whilst it reached a conclusion.
25. There is a "significant public interest in safeguarding the investigatory process and without distraction". Safeguarding regulatory information is in the public interest "if there was a likelihood that such information would end up in the public domain" this could mean that whistleblowers and members of the public are "less likely to share crucial information relating to a potential act of wrongdoing with Ofgem". In Ofgem's assessment the balance lay in favour of withholding the requested information.

### **Balance of the public interest**

26. During his investigation the Commissioner established that Ofgem's investigation was "still ongoing" and that "No other information, other than what we have already provided has been published regarding the requested information".
27. The Commissioner has decided that Ofgem's arguments in favour of withholding the information are more persuasive, in this instance. Whilst he understands the complainant's interest in the accusations made, he considers that there is already information in the public domain that sets out the history and the issues concerned. Additionally, the investigation is not concluded. Therefore the justification for releasing information that has the potential to undermine the enforcement investigation is limited and tips the balance in favour of non-disclosure.

## **Section 44: Prohibitions on disclosure**

28. Section 44(1)(a) provides an exemption from disclosure under FOIA for information which is prohibited from disclosure under any other law or enactment. Section 44 is an absolute exemption and isn't subject to the public interest test.
29. Ofgem has provided the withheld information to the Commissioner and this analysis looks at whether Ofgem is entitled to withhold the requested information under section 44(1) of FOIA.

### **Ofgem's view**

30. Ofgem advised the Commissioner that sections 105(1)(a) and (b) of the Utilities Act 2000 prohibited it from disclosing the information the complainant has requested. The information it withheld were "emails to Ofgem's investigation into British Gas Trading Ltd's compliance with its licence conditions".

31. Section 105 of the Utilities Act -

"covers information obtained under or by virtue of the relevant parts of the Gas and Electricity Acts (or other specified legislation) and relating to the affairs of any individual, or to any particular business, during the lifetime of the individual or so long as the business continues to be carried on".

32. Ofgem states that -

"In order for the Authority to make effective use of its extensive enforcement powers it needs to make appropriate arrangements in regard to the collection/retention of information."

Information provided to Ofgem "including information provided on a voluntary basis" where it has not made use of its powers to compel information to be produced "as in investigations, is protected by section 105(1) where it relates to our functions as set out in that section and relates to the affairs of a particular individual or business". Information that is gathered through Ofgem's "own monitoring activities is also exempt from disclosure under section 105(1) again, where it relates to the affairs of a particular individual or business".

33. The information Ofgem withheld under this exemption "was obtained by virtue of the provisions listed under the statutory provisions set out at s.105(1)(a)". It describes itself as "a creature of statute, formed under the Utilities Act 2000 and performing functions under the Electricity Act 1989, Gas Act 1986 and various legislation". Ofgem clearly states: "Any information that comes into our possession for the purposes of

performing our regulatory functions listed under s.105(1)(a) shall not be disclosed.”

34. Ofgem argues that -

“The correspondence with The Times was obtained by virtue of the Authority’s powers set out in Schedule 1 (11) (1) of the Utilities Act 2000 to “do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.””

Therefore the information “has been obtained by virtue of [Ofgem’s] competencies listed under section 105(1)(a) and the prohibition on its disclosure applies”.

35. Ofgem contends that it has -

“thoroughly considered the scope of the prohibition and its application to the information requested in this case. Ofgem’s position is that the information requested consisting of correspondence between Ofgem and The Times for the period of February 2023 as specified in the Requestor’s request was obtained, is held and includes information as to the affairs of The Times, British Gas Trading Ltd and of other businesses. This information was obtained under or by virtue of the Authority’s functions under Part 1 of each Act [4] namely under section 34 of the Gas Act 1986 and therefore is within the scope of the general prohibition on disclosure under section 105(1) UA [Utilities Act]”.

36. The withheld information “directly relates” to various businesses including The Times, British Gas Trading Ltd and their “affairs”. Ofgem submits that disclosing this information would be a breach of its statutory duty. Its view therefore is that section 44 is engaged.

37. Ofgem underpins its argument by explaining that section 105 (2) to (4) “provides exceptions from the prohibition but that, “Parliament has carefully considered in precisely what circumstances and legal contexts the wide prohibition should not apply.” Ofgem does not consider that any gateway applies. One of the gateways “allows disclosure for the purpose of facilitating the performance of any functions of” Ofgem. It refers the Commissioner to his guidance<sup>5</sup> on this exemption where it says that gateways that permit disclosure for a specified purpose are likely to be irrelevant when considering a response under FOIA as an

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<sup>4</sup> Part 1 of the Gas Act 1986 and Part 1 of the Electricity Act 1989

<sup>5</sup> [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-approach-to-transparency/foia-guidance/foia-guidance-version-1.1-31122020)

FOI disclosure is to any member of the public. Ofgem's view is that "disclosure under FOIA is not a function specifically entrusted to a public authority but creates general duties..." It refers to "disclosures otherwise than under this Act" from section 44 -

"meaning that if there is a prohibition elsewhere on disclosure, FOIA itself does not provide any exemption from that prohibition or any basis for disclosing the information..."

38. Ofgem contends that gateways like section 105 "only permit disclosures for specific purposes such as legal proceedings". Ofgem stresses that FOIA is disclosure to the general public and that "FOIA disclosures are not for specific purposes". Where there is a gateway, "Ofgem has a power to disclose, not a duty." It again refers to the Commissioner's guidance as to the reasonableness of its decision not to disclose under a gateway which will be discussed later, in paragraph 40.
39. In conclusion, Ofgem "considers that section 105(1) is a statutory prohibition on disclosure" and that this "prohibition is not dis-applied by a gateway". Therefore, section 44(1)(a) applies.

### **The Commissioner's view**

40. The Commissioner's guidance (in line with the Upper Tribunal<sup>6</sup> where it was determined that neither the Commissioner nor the tribunal had jurisdiction to determine whether the public authority had acted reasonably) states the following:

"Where a public authority has discretion about applying a gateway to disclosure, the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable. So, if there is a statutory prohibition on disclosure and the authority has decided that it is not disapplied by a gateway, then the Commissioner will accept that section 44(1)(a) applies."<sup>7</sup>

41. The Commissioner's decision is that Ofgem is entitled to rely on section 44(1)(a) of FOIA to withhold the requested information. Section 105(1)

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<sup>6</sup> Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AC

<sup>7</sup> [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/Prohibitions-on-disclosure-(section-44)-FOIA-guidance-version-1.1-31122020)



of the Utilities Act 2000 prohibits Ofgem from disclosing it, and there is no lawful gateway for disclosure.

### **Section 40(2) – third party personal information**

42. In the following analysis the Commissioner will only consider the redaction of third party personal information from the information that was provided to the complainant. The Commissioner does not intend to consider any third party personal information contained in the information that was withheld in its entirety because he has already decided that it is exempt under sections 31 and 44 of FOIA.
43. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
44. Section 3(2) of the Data Protection Act 2018 defines personal data as: “any information relating to an identified or identifiable living individual.”
45. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
46. In this case, the withheld information comprises the name of an external individual making an enquiry and their contact details. Therefore, the Commissioner is satisfied that the withheld information is personal data as the information relates to and identifies that individual.
47. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states: “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
48. In the case of an FOIA 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.
49. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
50. The Commissioner accepts that the complainant is pursuing a legitimate interest in wanting to understand Ofgem’s “reported behaviour in trying to force journalists at the Times to reveal their sources” and that the complainant is pursuing a legitimate interest. The complainant wants to

be able to see the communications between The Times and Ofgem at a particular time in relation to an investigation. However, this email is an enquiry in order to elicit some average costs and its contents have been disclosed. The Commissioner does not consider the legitimate interest identified is sufficient to outweigh the rights and freedoms of the third party individual. The individual will hold a reasonable expectation that their name and contact details would remain private and confidential.

51. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. Ofgem is entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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52. 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)

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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