

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2018

Public Authority: Utility Regulator

Address: info@uregni.gov.uk

Address: Decision (including any steps ordered)

1. The complainant has requested various items of information in respect of the Utility Regulator's determination of the 2015-2020 Price Control applied to SONI (System Operator for electricity in Northern Ireland). The Utility Regulator provided some information but refused the request by virtue of sections 36(2)(b)(i) and 36(2)(b)(ii) and section 40(2) FOIA. The Commissioner's decision is that the Utility Regulator has complied with its obligations under section 1(1) FOIA and that it was entitled to rely on sections 36(2)(b)(i) and 36(2)(b)(i) of the FOIA in respect of the disputed information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 15 March 2017, the complainant wrote to the Utility Regulator and requested the following information regarding the publication of the final licence modifications in respect of the SONI 2015-2020 TSO Price Control and referenced in the Utility Regulator's Final Determination in respect of the Price Control published on 24 February 2016:
 - (a) *the "further analysis" carried out, as referenced to in the above extracts of the Final Determination, including all internal working papers and other written documents, underlying the Utility Regulator's decision to continue to apply the overarching WACC*RAB regulatory framework in the 2015-2020 Price Control; and*
 - (b) *all instructions to, and advice and reports received from, external consultants (as referred to in the above extracts of the Final Determination), including correspondence and notes of all meetings and conference calls to discuss that advice and/or*

reports – concerning SONI's financeability under the price control and SONI's proposals for a new regulatory framework."

3. The Utility Regulator responded on 13 April 2017. It confirmed that it held relevant information and whilst it disclosed some, it withheld the remainder in reliance on section 36(2)(b)(i) and (ii), section 40(2) and section 44(1)(a) of the FOIA.
4. Following an internal review the Utility Regulator (UR) wrote to the complainant on 26 May 2017. It stated that it was upholding its original decision to withhold information in respect of section 36(2)(b)(i) and (ii) and section 40(2). However it further stated that it was not immediately obvious that the information considered exempt under section 44(1)(a) was exempt under that section. The outcome of the review was that the information previously withheld under section 44(1)(a) was actually exempt under sections 36(2)(b)(i) and (ii) FOIA.
5. During the course of the Commissioner's investigation, the Utility Regulator disclosed further information to the complainant it had previously withheld.

Scope of the case

6. The complainant contacted the Commissioner 10 August 2017 to complain about the way its request for information had been handled. In particular, the complainant expressed concern that the Document Log provided by the Utility Regulator might not correctly itemise all of the 'external advice' or records of discussions with external consultants.
7. The complainant also considers that the Utility Regulator has failed to explain how disclosure would lead to the kind of prejudice described in sections 36(2)(b)(i) and (ii) and has argued that it has conflated its consideration of the exemptions in question with the requirement to carry out a separate public interest test.
8. It has also expressed concerns that the Qualified Person did not in fact give contemporaneous consideration to the request and that the internal review process was a mere rubber stamping exercise.
9. The complainant provided some background information and informed the Commissioner that at the core of its appeal is its concerns that the Price Control does not enable the Transmission System Operator (TSO) to finance SONI's licenced activities, that the model is unsuitable given the nature of SONI's business and it considers the application of this framework to be incapable of rendering it operable as a standalone, financeable business. The complainant has further informed the

Commissioner that the decision has been challenged via an appeal to the CMA (Competition and Markets Authority).

10. The complainant has however expressed concern that the Utility Regulator and its advisers have asked the CMA to refrain from exercising its jurisdiction on the basis that the complainant is asserting its rights under FOIA, whilst separately it has declined to disclose the requested information under the FOIA partly on the basis that the CMA appeal would be sufficient to address any public interest concerns under the FOIA. It has added that these positions are irreconcilable and disingenuous.
11. The complainant also confirmed that she is not seeking to appeal the non-disclosure of wholly internal communications or of information which the Utility Regulator claims to be exempt by virtue of section 40(2) FOIA.
12. Therefore, the Commissioner considers that the scope of her investigation is to consider whether the Utility Regulator has complied with its obligations under section 1(1) of the FOIA, and whether it was entitled to rely on section 36(2)(b)(i) and (ii) for the remaining withheld information.
13. The Commissioner has no jurisdiction to comment on the decision of the Utility Regulator itself or the information it has or will provide to the CMA.

Reasons for decision

Section 1 – General right of access to information held

14. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
15. In her consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.

16. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
17. In this particular case, the Utility Regulator has informed the Commissioner that on receipt of the request, three members of staff in the department working on the matters referred to in the request, carried out a document and information search to identify all information falling within the scope of the request. The search consisted of accessing electronic folders where information relevant to the request was saved and a manual search by the members of staff involved in the workstream of their handwritten notes. Additionally, two other members of staff involved either directly or indirectly, also carried out a document search.
18. The Utility Regulator confirmed that the search terms used included 'SONI', 'finance', 'financeability', 'financial model', 'WACC', 'cost of capital' and 'RAB', and these key words were also used to search for relevant emails in Outlook. In addition, all documents relevant to the scope of the request were stored on networked folders and have not been deleted or destroyed as its records management policy in respect of this type of information is that it should be retained for, at least, an initial period of five years.
19. In relation to the complainant's concerns that it had not identified all information in respect of external consultants, the Utility Regulator informed the Commissioner that the team members involved in carrying out the search were extensively involved in the workstream on a continuous basis for a number of years and therefore have a high familiarity with all aspects of the relevant documentation. They were also actively involved in managing and liaising with the external consultants appointed by the Utility Regulator. The Utility Regulator is confident that each team member systematically stored and organised all documentation relating to each aspect of the workstream in the period up to and following the publication of the Final Determination. It is therefore confident that it has identified all of the relevant information falling within the scope of the request.
20. The Commissioner has considered the details of the search provided by the Utility Regulator and in her view believes that the search conducted was both reasonable and proportionate. She has therefore concluded, based on the balance of probabilities, that the Utility Regulator has complied with its obligations under section 1(1) of the FOIA.

Section 36 – prejudice to the effective conduct of public affairs

21. Sections 36(2)(b)(i) and (ii) provide that information is exempt from disclosure if it would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
22. The Commissioner has viewed the extensive disputed information and notes that it falls within three broad categories of information in the form of spreadsheets, emails and word documents. All of the information relates to the Utility Regulators role of setting Price Controls for SONI for the period 2015 to 2020 and is either advice from external consultants or internal discussions.
23. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised qualified person for that public authority. The exemption can only be cited where the reasonable opinion of a specified qualified person considers that section 36 is engaged.
24. In order to engage any limb of section 36, the 'Qualified Person' (QP) must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
25. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given;
 - consider whether the opinion was reasonable.
26. The Utility Regulator has informed the Commissioner that the qualified person is its Chief Executive Officer and that its FOI Officer met with her on 11 April 2017 to review all documents relevant to the request. The opinion of the qualified person was sought and given at this meeting.
27. During the meeting, the Utility Regulator confirmed that a document log was also provided which documented the exemptions that could be applied and the reasons why. The QP was also provided with arguments for and against engaging the exemption. The discussion included a consideration of the effect of releasing the documents in terms of the UR's ability going forward to procure free and frank advice from external

advisors, as well as Utility Regulator personnel engaging in a free and frank exchange of views in respect of various options for price controls.

28. The Qualified Person's opinion was that in all the circumstances of the case disclosure of the withheld information 'would' (as opposed to be 'would be likely') inhibit the free and frank provision of advice and the free and frank exchange of views. She concluded that the inhibition that would occur would be a 'chilling effect' as disclosure of the information would inhibit free and frank discussions and advice in the future which would lead to both external and internal advisors and Utility Regulator personnel being much more cautious in future when giving advice or deliberating the suitability of otherwise potentially extreme views and/or options.
29. During the course of the Commissioner's investigation, the Utility Regulator's reliance on sections 36(2)(b)(i) and (ii) was reconsidered with the Qualified Person's opinion being sought in the same way as at the time of the request.
30. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for the Utility Regulator, and provided at the appropriate time. She has therefore gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided, but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
31. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise in relation to the particular sub-section of section 36¹ the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

32. The Commissioner considers that section 36(2)(b) concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation, and the free and frank exchange of views associated with the UR's role in relation to setting price controls. A significant consideration in relation to this is the timing of the request, with more weight attached when the issue is live as opposed to a matter already decided.
33. The Qualified Person has stated that the release of this information would inhibit its advisors and staff from providing free and frank advice, and the free and frank exchange of views in the future. She added, that she has considered the views of both external advisors and internal information authors, and notes that one of the advisors has clearly stated that they would not explore extreme options or provide advice which may be considered controversial. This would reduce the quality of the debate between the Utility Regulator and its advisors when forming proposals and in turn have a detrimental impact on its ability to reach informed and complete decisions.
34. The Qualified Person further considers that it is imperative that its advisors feel they can engage with the Utility Regulator openly and comprehensively on any issue, many of which are controversial in nature so that its officials have all relevant advice at hand. Additionally, she has argued that its officials must be able to speak freely and honestly when considering actions that will have an effect on consumers. The Qualified Person considers that the release of this information could seriously hinder this process and in turn, the ability of officials to form the most effective decisions.
35. The Qualified Person has further explained that price controls are a key part of the Utility Regulator's work and one of the main tools for protecting consumers. Utility Regulator officials must be able to carry out a thorough analysis and be able to think through and deliberate all of the implications of particular options to ensure the most comprehensive and best decision is reached for consumers.
36. Additionally, it has argued that staff must be allowed to speak freely, honestly and completely when considering actions that will have an effect on consumers. It continued, that it is vital that staff have a free space to 'think the unthinkable' and employ imagination without the fear that nascent policy proposals will be held up to ridicule.
37. A safe space to consider options in private must be maintained. The disclosure of this information would undermine this process and may

well result in less robust, well considered or effective decisions being made.

38. The Commissioner has considered the Qualified Person's opinion, and considers it is reasonable that the prejudice envisioned under sections 36(2)(b) would occur. She has therefore accepted that sections 36(2)(b)(i) and (ii) are engaged and has gone on to consider the public interest arguments associated with these exemptions.

Public interest factors in favour of disclosure

39. The Utility Regulator acknowledges the general presumption that favours the disclosure of public documents, and the importance of transparency in relation to its functions and activities.
40. It has also recognised the general public interest in relation to the internal workings of a non-ministerial department and in matters of public importance which could inform the debate in respect of price controls.
41. The complainant considers that it is implausible to suggest disclosure would result in external consultants being inhibited from advising on future price controls and has argued that it was incorrect to attach weight to 'safe space' arguments which can only be relied on when the issues are live, pointing out that the issue relates to deliberations which took place in 2015, and to a decision which is now in force. It has also argued that in respect of its public interest test, the Utility Regulator's initial arguments concern wholly internal communications.
42. The complainant considers that there is a compelling public interest in favour of the disclosure of the expert information produced in the context of price control and refers to the Information Commissioner's decision notice for FS50284263 in respect of a request to Ofgem for similar information, which stated disclosure:
43. *"would provide the public with an insight into Ofgem's decision making process regarding DPCR5...disclosure could genuinely contribute both to the aims of transparency and accountability, but could also reassure the public that due process had been followed, or indeed expose potential flaws in Ofgem's decision making processes"*.
44. The complainant has further stated that other regulators routinely make comparable external reports available on their websites

Public interest factors in favour of maintaining the exemption

45. The Utility Regulator considers that where an exemption is engaged, there is automatically some public interest in maintaining the

exemption, and has argued that there would need to be a specific public interest in disclosure of that information to move away from that starting point.

46. The Utility Regulator further informed the Commissioner that it is an independent non-ministerial government department with regulatory responsibility for Northern Ireland's electricity, gas and water industries, with a key aspect of its role to act in the best interests of consumers, wherever possible by promoting effective competition between those engaged in commercial activities that it regulates. The Utility Regulator has informed the Commissioner that SONI is the electricity system operator for Northern Ireland and it considers that its continued ability to be able to perform its statutory role as the sector regulator is a significant public interest factor in favour of maintaining the exemption.
47. The Utility Regulator further considers that price controls are a key part of its work and one of the main tools for protecting consumers. Utility Regulator officials must be able to carry out a thorough analysis and be able to think through all the implications of the particular options, to ensure the most comprehensive and best decision is reached for consumers.
48. The Utility Regulator has also argued that the disclosure of the requested information is not necessary for the public to understand its proposals and decisions with regard to SONI's price control and the reasons for them, as it considers the public interest is served through extensive engagement and consultation both with the public and third parties, including the consumer representative body, the Consumer Council for Northern Ireland.
49. The Utility Regulator has informed the Commissioner that an additional relevant factor at the time of the internal review was that another regulatory body (the CMA) was considering an appeal made by the complainant on the subject matter of the request. It therefore considers that many of the public interest arguments which favour disclosure such as transparency, accountability and good decision making, will be met as it is essentially another means of scrutiny and regulation since the CMA investigation was concerned with all the matters referred to in the complainant's request.
50. In respect of the complainant's arguments that the issue is no longer live and its safe space arguments not applicable, the Utility Regulator has informed the Commissioner that issues relating to price controls are essentially ongoing given that the price control is operationally live. Additionally, it has stated that discussions and debates on issues relating to the current operational price control will shape and inform

discussions and debates relating to subsequent price controls for the period 2020 to 2025.

51. It has further informed the Commissioner that advice received and/or views exchanged in relation to one company's price control can help to inform its policy in respect of price controls for other companies. It therefore disputes the view that safe space arguments have become irrelevant because a decision has been taken in respect of the introduction of the current price control.

The balance of the public interest test

52. In cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of the prejudice in assessing where the balance lies.
53. The Commissioner acknowledges the general public interest in transparency and accountability of decisions taken by public authorities, and the more specific public interest in the disclosure of information in respect of price controls.
54. In her consideration of the timing of the request the Commissioner notes the complainant's arguments that the price controls have been set, and the matter is no longer live. However, the Commissioner acknowledges the Utility Regulator's argument that issues relating to price controls were essentially ongoing given that the price control is operationally live.
55. Additionally, the Commissioner notes the Utility Regulator's arguments that discussions and debates on issues relating to the current operational price control will shape and inform discussions and debates relating to subsequent price controls, and its comments that the advice received and/or views exchanged in relation to one company's price control, can help to inform its policy in respect of price controls for other companies.
56. The Commissioner is also mindful that at the time of the internal review, the complainant had taken an appeal against the Utility Regulator in respect of its price controls to the CMA, indicating that the issue was not fully settled and therefore still live.
57. The Commissioner has also given weight to the considerable public interest that the Utility Regulator is not impeded from performing one of its key roles of acting in the best interests of consumers and that its setting of price controls is a key tool via which it does this.

58. On balance, in weighing the competing factors described above the Commissioner has concluded that in all the circumstances of the case, the balance is weighted in favour of maintaining the exemption and consequently, that the Utility Regulator was entitled to rely on section 36(2)(b)(i) and (ii) of the FOIA. Particular weight is given to the fact that the matter is was being contested through the appellate body. In addition, the need for a 'safe space' in this instance is an important one and the combination provides a significant weight in favour of the maintenance of the exemption.

Right of appeal

59. 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

60. 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.
61. 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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