

## **Environmental Information Regulations 2004 (EIR) Decision notice**

**Date:** 3 November 2022

**Public Authority:** Office of Gas and Electricity Markets (Ofgem)  
**Address:** 10 South Colonnade  
Canary Wharf  
London  
E14 4PU

### **Decision (including any steps ordered)**

---

1. The complainant has requested information regarding the number of suppliers that were served the Request for Information Notices ("the notices") by the Office of Gas and Electricity Markets ("Ofgem"). Ofgem refused to disclose the information and relied on regulation 12(5)(b) of EIR (course of justice).
  2. The Commissioner's decision is that, Ofgem has failed to demonstrate that regulation 12(5)(b) of the EIR is engaged. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
    - Disclose the withheld information to the complainant.
  3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.
-

## Request and response

---

4. On 13 August 2021, the complainant wrote to Ofgem and requested information in the following terms:  
  
"Please confirm (i) how many suppliers received an identical request for information; and (ii) for those that did not receive such a request, on what basis that decision was made?"
5. Ofgem refused the request relying on regulation 12(5)(b) of EIR to withhold the information. The complainant requested an internal review, during which they restricted the request to the first element namely "(i) how many suppliers received an identical request for information." Ofgem upheld its original position.

## Reasons for decision

---

6. As the complainant restricted the internal review to the first part of the request, the Commissioner will only consider whether Ofgem is entitled to rely on regulation 12(5)(b) of EIR as a basis for refusing to provide the number of suppliers that received identical notices.

### **Regulation 12(5)(b) – the course of justice**

7. Regulation 12(5)(b) provides an exception from the obligation to disclose environmental information which would adversely affect the course of justice, the ability of a person to receive a fair trial, or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
8. The Commissioner's published guidance explains that this exception is broad and may encompass a wide variety of judicial or quasi-judicial processes that a public authority may conduct or be involved in<sup>1</sup>.
9. In the internal review response, Ofgem explained the various stages in its functions where notices may be served. It explained that there is no statutory requirement that a formal investigation must have been opened before Ofgem could use its statutory powers under section 28 of Electricity Act 1989. The notices form part of Ofgem's ongoing live inquiries into licensees' compliance with the Smart Meter Obligations,

---

<sup>1</sup> [Regulation 12\(5\)\(b\) – The course of justice and inquiries exception | ICO](#)

and the notices were served to ascertain compliance with the electricity supply licence.

10. The Commissioner is satisfied that the requested information relates to an investigation conducted by Ofgem in accordance with its statutory functions.
11. However, the Commissioner is not persuaded by Ofgem's arguments that the disclosure of the information would have an adverse effect on the investigation process or undermine public confidence in that process.
12. Ofgem's contend that the public authority needs a safe space in which to gather evidence, consider and weigh competing arguments before it decides whether some form of enforcement is justified. This may indeed be the case with regard to part ii) of the request, but the Commissioner does not see how this can apply to part i) of the request. Ofgem has not explained how the disclosure of the number alone would inhibit its ability to effectively conduct ongoing enquiries or affect future or further investigations. The request only requires the disclosure of the number of suppliers that received identical notices.
13. As Ofgem has explained the purpose of the notices is to gather information to assist it in reaching a decision on whether to open a formal investigation, the Commissioner is not persuaded that disclosure of the number of notices issued would give any indication of the level at which Ofgem might consider opening a formal investigation. Disclosure of the number of licensees that received notices would not disclose any additional information to indicate whether, or not, a formal investigation has been opened.
14. Given that Ofgem has failed to demonstrate why disclosure would adversely affect the course of justice, the Commissioner concludes that the exception 12(5)(b) of EIR is not engaged.
15. As the exception is not engaged it is not necessary to consider the public interest test.

## Right of appeal

---

16. 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)

17. 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.
18. 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 .....**

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