

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 November 2023

**Public Authority:** The 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 Commissioner's decision is that Ofgem is entitled to withhold information about an application for an Independent Distribution Network Operators licence under section 44(1) of FOIA as there's a prohibition on its disclosure. It's not necessary for Ofgem to take any corrective steps.

#### **Request and response**

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2. The complainant made the following information request to Ofgem on 2 February 2023:

"I confirm the request to obtain, as quickly as possible, in respect of a pending application for an IDNO licence:

  - a) A copy of the application and any supporting or related documents or correspondence;
  - b) A copy of any pre-application advice or information issued to the Applicant or relevant to the application;

c) A copy of the criteria by which the application will be considered and assessed by Ofgem including reference to any statutory provisions and a copy of or link to any internal guidance relevant to consideration and assessment;

d) Confirmation of the process and procedure to be followed in order to file an objection;

e) Confirmation of the process to be followed by Ofgem following receipt of the application, including to whom notice of the application must be provided;

f) Confirmation of the date of receipt of the application;

g) Confirmation of the date and time by which an objection to the application must be filed, clarification of whether an objection can be submitted by letter and/or e mail, and the postal address, e mail address and reference, to be used.

The application is believed to have been submitted by Green Generation Energy Networks Cymru Limited Co ref 13060815.

We would repeat the requests above, in respect of any application for an Independent Distribution [sic] Network Operators licence application, which is pending, from any associated company, including Bute Energy Limited and Bute Holdings Limited, or which in any way relates to the placement and operation of transmission and/or distribution lines in the Towy valley in Wales.

In order to file a fully considered objection, there is a need to prepare and to obtain advice..."

3. Ofgem provided some relevant information and links to other relevant information. It withheld the remaining information under section 44(1) of FOIA. Ofgem advised that section 105 of the Utilities Act 2000 prohibited it from disclosing this information.

### **Reasons for decision**

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4. This reasoning focusses on whether Ofgem is entitled to withhold the requested information about the application for an Independent Distribution Network Operators licence.
5. Section 44(1)(a) of FOIA says that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment.

6. Ofgem has advised that section 105(1) of the Utilities Act 2000 prohibits it from disclosing information the complainant has requested.
7. Section 105 of the Utilities Act says that information which has been obtained under or by virtue of the Act and relates to the affairs of any individual or any particular business shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on.
8. In its response to the request, Ofgem advised that it gathered the information by virtue of the exercise of its functions and that it relates to the affairs of a business. As such, section 44(1) applied.
9. In their request for an internal review, the complainant made a case that the information could be disclosed, quoting section 6a of the Electricity Act 1989 and section 105(3) of the Utilities Act.
10. Ofgem is a creature of statute. It was formed under the Utilities Act and performs functions under the Electricity Act, Gas Act and various legislation. It's entitled to withhold any information that comes into its possession for the purposes of performing its regulatory functions listed under section 105(1)(a) of the Utilities Act.
11. The Commissioner is satisfied that Ofgem holds the information the complainant has request by virtue of its statutory functions.
12. The Utilities Act 2000 provides gateways for lawful disclosure, but the Commissioner doesn't consider that any of these gateways have been met. In any case, these gateways provide a power to disclose, not a duty to disclose.
13. Usually, gateways only permit disclosure for specific purposes, eg for legal proceedings. By contrast, disclosure under FOIA is to the general public. Information released in response to a FOIA request must be disclosable to any member of the public who requests it, irrespective of the purpose or reason for the request. In view of this, in most instances gateways that permit disclosure for a specified purpose are likely to be irrelevant when considering a response under FOIA. For example, if a particular gateway permitted disclosure for the purpose of legal proceedings, the fact that a requester may be a party to those proceedings would not be relevant when considering whether information should be disclosed to them under FOIA. This is because the FOIA disclosure would in effect be to the world, not solely to the requester.
14. 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's a statutory prohibition on disclosure and the authority has decided that it's not disapplied by a gateway, then the Commissioner will accept that section 44(1)(a) applies.

15. The Commissioner's decision is that Ofgem correctly applied section 44(1) of FOIA to the disputed information because the Utilities Act prohibits Ofgem from disclosing it.
16. Section 44 is an absolute exemption which means it's not subject to the public interest test.

## **Right of appeal**

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17. 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)

18. 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.
19. 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**

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