



Neutral citation number: [2023] UKFTT 00266 (GRC)

Case Reference: EA/2021/0363

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by CVP on 6 September and 9 December 2022

Decision given on: 8th March 2023

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Jo Murphy
TRIBUNAL MEMBER Pieter de Waal**

Between

SCOTTISH POWER ENERGY RETAIL LIMITED

Appellant

And

**INFORMATION COMMISSIONER
OFGEM**

Respondents

Decision: The appeal is Dismissed.

Substituted Decision Notice: No substituted decision notice.

Scottish Power were represented by Stephen Kosmin

The Commissioner was not represented.

Ofgem was represented by Jennifer Thelin

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
2. The Tribunal considered an agreed open bundle of evidence comprising 800 pages, a closed bundle, written submissions from both parties and a bundle of authorities.

BACKGROUND

3. On 7 August 2020, Stuart Reid on behalf of Scottish Power Energy Retail Limited (Scottish Power) wrote to the Office of Gas and Electricity Markets (Ofgem) as part of a broader concern Scottish Power had about a potential breach of licensing conditions in relation to Smart Meter Obligations. In the course of that correspondence, the following information was requested: -

1. the number of suppliers who Ofgem believe not to have achieved their 2019 milestones.
2. out of these suppliers, how many are being treated in a similar way by Ofgem to [Scottish Power], and
3. of the large suppliers who Ofgem believes did not achieve their milestones, and

4. if Ofgem is not treating these suppliers in a similar way to [Scottish Power], an explanation of the grounds on which those decisions have been taken and how their situations differ from those of [Scottish Power].

4. Ofgem responded on 4 September 2020. It provided information within the scope of elements 2 and 4, but withheld the remaining information. It relied on Regulations 12(4)(e) and 12(5)(b) of the Environmental Information Regulations (EIR) in order to do so.
5. Following an internal review Ofgem wrote to Scottish Power on 23 December 2020. It upheld its original position. Scottish Power contacted the Commissioner on 19 March 2021 to complain about the way the request for information had been handled, and the Commissioner carried out an investigation.

THE LAW

6. Pursuant to reg 12 EIR: -

12.— Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

...

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

...

- (e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

(b) 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;

...

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law...

7. Following the case of *Montague v Information Commissioner* [2022] UKUT 104 (AAC) it is confirmed that 'FOIA does not permit aggregation of the separate public interests in favour of maintaining different exemptions when weighing the maintenance of the exemptions against the public interest which favours disclosure of the information sought' (paragraph 4).
8. In addition, the issue of the public interest 'is to be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request' (paragraph 5).
9. In this case that date is 4 September 2020 (and not the later date of the communication of the internal review which was 23 December 2020).

THE DECISION NOTICE

10. The decision notice is dated 11 November 2021. The Commissioner considered that: -

.... given that Ofgem's public interest arguments for maintaining that exception rely in large part on the fact that the particular internal communications relate to the possibility of enforcement action, the Commissioner considers that the Regulation 12(5)(b) exception should be the logical starting point of her analysis. If Ofgem is unable to demonstrate that disclosure would adversely affect its ability to consider or pursue enforcement action, it is unlikely to be able to demonstrate the need for a safe space to discuss such matters internally [the basis for reliance in regulation 12(4)(e) EIR].
11. The Commissioner explained that the information sought is environmental information as defined in regulation 2(1) EIR (which is not in dispute).

12. 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.

13. The Commissioner set out Ofgem's case as follows: -

14. Ofgem explained that it has powers under the Electricity Act 1989 and the Gas Act 1986 to investigate whether particular gas or electricity providers are complying with the Standard Licensing Conditions of their gas or electricity supply licence.

15. In this particular case, Ofgem wished to establish whether several energy providers had failed to discharge their obligations in respect of Smart Meters. Each provider must produce a roll-out plan demonstrating how it intends to increase the proportion of its customers who have Smart Meters. The roll-out plan must also set annual milestones which the provider is then required to meet. If it does not, Ofgem then has the power to impose a sanction upon the company.

16. The withheld information in this case comprises of materials generated by Ofgem in order to assess the compliance of various energy providers against the annual milestones they had set themselves and to determine whether any sanctions were appropriate for those providers who had failed to meet their targets.

14. On the basis of this the Commissioner was satisfied that Ofgem is carrying out an investigation in accordance with its statutory functions. The Commissioner went on to consider Ofgem's arguments about the consequences of disclosure: -

18. Ofgem considered that disclosure of the withheld information would: -

'not only adversely affect the course of the ongoing investigation process through the disclosure of gathered evidence before the investigation has concluded, but it may also undermine public confidence in the inquiry/investigation process itself. The information requested relates to a live and ongoing inquiry into [the Company]'s compliance with the Smart Meter Obligations. It is clear that the public disclosure of such information would not only inhibit the Authority's ability to effectively conduct an investigation, but would damage public confidence in such inquiries being undertaken appropriately and with due regard to the rights and expectations of involved parties.'

19. Ofgem went on to explain that:

'The disclosure of the information would have an adverse effect on the Authority's investigation into [the Company]'s compliance with the Smart Meter Obligations because it would have no "safe space" in which to

consider enforcement. The disclosure of the requested information would mean the release of irrelevant information to the investigation and distract Ofgem from the enforcement of the matter at hand. Also, a similar adverse effect would occur: disclosure could mean that Ofgem would receive representations on its internally agreed position from interested parties, ranging from the rest of the energy market through to individuals with strongly held views on the matter. Those representations would be voluminous and interrupt and distract the Ofgem and the EOB from making an appropriate determination of whether to take enforcement action in this and future cases. Opening EOB papers and discussion to public scrutiny would fundamentally undermine the ability of the EOB to make determinations without the distraction of external influences from other licensees or individuals.”

20. Ofgem was also concerned that disclosure of the withheld information would reveal the more detailed information about the threshold level at which it would initiate enforcement action. Revealing such information would, Ofgem argued, encourage providers to do the “bare minimum” needed to avoid enforcement action, rather than striving to meet the target.

21. Finally, it noted that:

“In addition, disclosure of the requested information would prejudice the Authority’s ability to gather the facts and/or evidence in future investigations. Information on relative performance was requested by the Authority from licensees using its “monitoring” statutory powers to request information. A person who intentionally alters, suppresses or destroys any document or record of information which that person has been required to produce is liable to a criminal conviction. Notwithstanding the threat of criminal conviction for the alteration, suppression or destruction of documentation there is the potential for obstruction or deliberate obfuscation by licensees should they wish to evade providing true reports to Ofgem. Ofgem relies on establishing and maintaining good relationships with licensees in order to secure high quality information and evidence. Releasing the requested information would discourage other licensees from responding in the open and transparent way that Ofgem is accustomed to. Licensees, aware that the material is to be published, may seek to massage information to present that information in the best possible light for publication. This would result in greater resource requirements for Ofgem in dealing with the subsequent clarifications needed to remove those obfuscations. If such information is released applicants will be less likely to engage openly with Ofgem in relation to future information monitoring requests.”

15. The Commissioner accepted that disclosure of this information would adversely affect Ofgem’s ability to conduct both this investigation and further investigations. The Commissioner noted that: -

23. As a general rule, the Commissioner considers that the chances of an adverse effect are always greatest when an investigation or inquiry is ongoing – as is the case here. A public authority is entitled to its own private thinking space in which to gather evidence, consider and weigh competing arguments, before it decides whether some form of enforcement is justified.

16. The Commissioner concluded that: -

28. Whilst the Commissioner considers that the bar of “would adversely affect” implies that any adverse effect is more likely than not to occur, in the circumstances of this case, she is satisfied that disclosure of the withheld information would adversely affect Ofgem’s ability to conduct a statutory investigation. She is therefore satisfied that Regulation 12(5)(b) is engaged...

17. On that basis the Commissioner went on to consider the public interest test: -

31. The complainant considered that there was a strong public interest in disclosure because:

“There is a lack of transparency over how Ofgem assessed the other half of all large suppliers allegedly in breach of their 2019 milestones obligation. As matters stand, [the Company] simply does not know what it is that differentiates it from some, or the majority of, other suppliers allegedly in breach, and against whom no enforcement action is being taken. There is a public interest in Ofgem’s enforcement decision-making being transparent and understandable. Refusing to disclose the basis of its enforcement decision making, without adequate justification, undermines the public confidence that this key sectoral regulator is taking decisions in a rational and fair way.

“There is a public interest in suppliers being treated fairly by Ofgem, to ensure there is confidence in the regulatory regime. Loss of confidence in the regulator may inhibit suppliers’ entry to and investment in the energy supply market more generally, which could harm consumers’ interest overall.”

32. In explaining why the public interest should favour maintaining the exception, Ofgem pointed to the adverse effects that disclosure might have and the strong public interest in preventing such effects.

33. Having considered the matter, the Commissioner is satisfied that, certainly at the point the request was made and for as long as the investigation remains live, the balance of the public interest favours maintaining the exception. There is a strong public interest in a public authority, which has regulatory powers relevant to the environment, being able to exercise those powers effectively and fairly.

34. In terms of transparency and being seen to be fair, the Commissioner notes that Ofgem published an open letter, in June 2020, which set out its broad approach to assessing compliance.

35. Whilst the Commissioner recognises that there is a strong public interest in public authorities which carry out regulatory functions setting out their strategic approach to regulation, there is often also a strong interest in not allowing the precise tactical options they intend to use to be fully defined.

...

37...If providers know the bare minimum, they need to achieve to avoid enforcement, then, all other things being equal, that bare minimum will become the new target – rather than the milestones that the providers have set themselves. That will affect the overall implementation of the Smart Meter programme and Ofgem’s ability to ensure that the programme is delivered as efficiently as possible.

...

39. Having taken this into account as well as the very strong public interest in allowing Ofgem to carry out its investigative function properly, the Commissioner is satisfied that the balance of the public interest favours maintaining this exception.

40. The Commissioner has also had regard to the EIR’s presumption in favour of disclosure. However, she considers that the public interest is not evenly balanced and therefore the presumption in favour of disclosure does not alter her judgment.

THE APPEAL AND THE HEARING

18. By the Grounds of Appeal dated 9 December 2021, Scottish Power submitted:

(a) Ground 1: the Commissioner fundamentally misunderstood the scope of the Request.

(b) Ground 2: the Commissioner erred in finding that the exemption under Regulation 12(5)(b) EIR was engaged at the “would adversely affect” standard; and

(c) Ground 3: the Commissioner erred in finding that the public interest balance favoured maintaining the exemption under Regulation 12(5)(b) EIR.

19. Thus, as well as arguing that the exception in regulation 12(5)(b) EIR has been wrongly relied upon by the Commissioner, Scottish Power also argued that the Commissioner has wrongly described the information sought in paragraph 16 of the decision notice (see above at paragraph 13). Scottish Power said that ‘the requested information only concerns what action (if any) Ofgem has chosen to take against those other suppliers who have not achieved their 2019 milestones and not why Ofgem has chosen to take action or not against those suppliers’.

20. In response to the appeal, the Commissioner explained:-

In effect, the Appellant argues that the Commissioner erred in failing to reach a decision concerning the reliance by Ofgem to withhold the information requested within the scope of part 1 of the request relying upon regulation 12(4)(e) and 12(5)(b) EIR.

The Commissioner’s decision on the application of regulation 12(5)(b) does in fact relate to the entirety of disputed information, including the information falling within the scope of part 1 of the request above. The Commissioner’s letter to the Appellant dated 6 September 2021 which set out the scope of the Commissioner’s investigation ... set out the 4 parts of the request as described above including part 1. Further, during correspondence as part of the Commissioner’s investigation, Ofgem referred in correspondence to part 1 of the request. The Commissioner therefore clearly considered Ofgem’s reliance upon regulation 12(5)(b) in relation to the information withheld falling within the scope of part 1 of the request as well as parts 3 and 4.

Unfortunately, the Commissioner omitted to refer to part 1 of the request in paragraph 4 of the DN. The Commissioner can nevertheless assure both the Appellant and Tribunal that this was simply an oversight / typographical error and that the Commissioner’s conclusions in the DN concern the information withheld relating to the request as a whole, including the information withheld under Part 1. The Commissioner apologises for any confusion caused.

21. In response to the appeal, in general, Ofgem stated as follows: -

The withheld information concerns a live enforcement action. Providing disclosure would prejudice the enforcement process in a number of respects,

including by providing information around the threshold for opening an investigation and disrupt both this current, as well as future, investigations.

Ofgem employees require a safe space in which to have discussions around whether or not to open an investigation; at this point the enforcement process is at a very early stage, and there is a particular need for clear, straightforward and robust advice.

In circumstances where Ofgem has publicly provided detailed guidance on the criteria it takes into account when deciding whether or not to open an investigation and provides parties with significant information by way of analysis and findings as part of the enforcement process, there is no significant public interest in further disclosure of information relating to this early stage in the enforcement process.

Indeed, the public interest points squarely away from providing disclosure which would disrupt Ofgem's important investigation, and enforcement, functions.

Here, the interest which SP advances is its own interest in disputing the decision to open an investigation; that is clear from its pleadings and, in particular, the evidence of Ms Skelton. SP has, through the Ofgem enforcement proceedings, an opportunity to dispute Ofgem's case. If it wished to challenge the decision to open an investigation it could have done so by way of an application for judicial review. In any event, it is clear the Tribunal has no jurisdiction to adjudicate on that decision.

22. Scottish Power provided a witness statement from Claire Skelton who is a senior member of Scottish Power's smart metering team and currently Head of Customer Experience and Policy (Smart Programme). Her statement includes a description of Ofgem's powers and the background to the smart metering programme. She stated that: -

The overarching smart metering rollout obligation...applying to holders of supply licences, was to take "all reasonable steps" (ARS obligation) to install relevant smart meters for domestic and certain non-domestic customers.

23. Ms Skelton provided an overview of Scottish Power's experience of being part of the rollout and the various developments in the procedures over the years. She explained

that: -

In addition to the overarching ARS obligation, suppliers were also separately required ...to meet Annual Milestones (contained in the supplier's roll out plan), within a certain tolerance level (the milestone obligation). The milestone obligation relates to a supplier's total relevant smart meter portfolio as a cumulative percentage of their total relevant customer portfolio (premises),

rather than the number of smart meters installed in the year to which the milestone obligation relates.

24. Ms Skelton then provided in her statement a very detailed description of negotiations and meetings with Ofgem in 2018-2019 about the ARS and the milestone obligations which led Ms Skelton to conclude, on the basis of assurances (set out at length in the statement) she said were received from Ofgem that: -

I was of the genuine, and I believe, reasonable view at the end of 2019, that Ofgem would not find us to be in breach of our milestone obligation, or, if it did, it would be on a technicality that would not be subject to enforcement by Ofgem.

25. Ms Skelton then set out the process by which Ofgem communicated in 2020 (both before and after the date of the request) with Scottish Power about possible and ongoing action by Ofgem in relation to Scottish Power's smart meter installation performance, and the statement then takes issue with Ofgem and the way that it has dealt with Scottish Power's case, and takes issue with the matters it is said Ofgem took into account. Ms Skelton

said: -

On 22 December 2020 (the date of Ofgem's decision on the internal review), ScottishPower was the only supplier for whom Ofgem had published on its website that it was opening an investigation in relation to the 2019 milestone obligation. To date, Ofgem has not published on its website details of any other investigations against other suppliers for the 2019 milestone obligation.

26. Ms Skelton explained that, at the time of her statement, April 2022, the investigation was still ongoing. Ms Skelton also explained that, in relation to the request for information: -

The information requested is sought to understand why enforcement action has been taken against Scottish Power and how Scottish Power differs from other suppliers who failed to meet their 2019 milestone obligation, but against whom no action was taken.

27. Ms Skelton gave evidence at the hearing in which she emphasised Scottish Power's concerns about why enforcement action had been pursued against it and not other

suppliers, and that Scottish Power had not expected to be subject to enforcement action given information it believed it had been given by Ofgem.

28. At the hearing, Scottish Power, in submissions, emphasised the points made in Ms Skelton's witness statements. Scottish Power challenged Ofgem's case that the evidence supported the position that disclosure 'would' rather than 'could' adversely affect Ofgem's enforcement and investigation functions and said that Mr Hargreaves had overstated the position and the risks. Scottish Power argued that Ofgem had also overstated the need for officials to have a 'safe-space' to discuss issues relating to possible enforcement proceedings and emphasised the need for officials to diligently perform their functions as disclosure under FOIA or EIR was always a possibility. Scottish Power attempted to draw a distinction between Ofgem's functions in deciding whether to begin an investigation (which was the position when Ofgem responded to the request on 4 September 2020), and the actual investigation itself (which did not commence until November 2020). Scottish Power argued that the public interest in transparency and openness in relation to Ofgem's enforcement functions weighed more heavily than any countervailing public interest in protecting Ofgem's enforcement procedures and discussions.

29. We had a witness statement from Rupert Hargreaves who is a senior civil servant employed by as a Deputy Director in relation to Enforcement. He is responsible for the oversight of Ofgem's Enforcement casework relating to breaches of relevant conditions and requirements under the Gas Act 1986 and the Electricity Act 1989 and this includes obligations in relation to smart metering.

30. Mr Hargreaves also gave evidence at the hearing. Parts of his witness statement are redacted and were discussed in a CLOSED session. Some of the redacted passages have now been disclosed in OPEN following discussion between Ofgem and the Tribunal.

31. Mr Hargreaves explained that Ofgem is a non-ministerial Government Department which operates under the direction and governance of the Gas and Electricity Markets Authority (the "Authority"). Ofgem is responsible for meeting the statutory duties placed on the Authority through various pieces of legislation.

32. The Authority's principal objective is to protect the interests of existing and future energy consumers. In order to do so, it exercises powers to investigate and take law enforcement

action against regulated persons in the electricity and gas industries. Ofgem uses these powers to undertake investigations into regulated persons' compliance with statutory 'relevant requirements and conditions'. This process is referred to as 'Enforcement'. Mr Hargreaves said: -

Enforcement action is a core part of our role and is essential to the delivery of our mission to make a positive difference for consumers. It ensures we can put right harm that is caused and there are meaningful consequences for regulated persons that fail to comply and, as such, regulated persons are deterred from breaching legal requirements. To that end, it is important to be clear, and transparent, about the enforcement actions we take, and why we take them.

33. In relation to smart metering Mr Hargreaves explained: -

Smart meters are replacing traditional gas and electricity meters across the UK as part of an essential national infrastructure upgrade to make our energy system more efficient. There are a number of benefits of having a smart meter. Smart meters give consumers real time information on energy use, expressed in pounds and pence, through an in-home display. This enables consumers to better manage their energy use. Smart meters allow energy suppliers to offer tariffs that reduce the consumer's charges, for example, if they use power when it is cheaper for the supplier to buy it on the wholesale market. Smart meters will also bring an end to estimated billing by providing automatic meter readings to energy suppliers, meaning consumers will only be billed for the energy they use.

During the foundation stages of the smart meter rollout a first-generation smart meter, known as a SMETS1 meter, was installed by suppliers. These first-generation meters communicated directly with the energy supplier that installed them. If a consumer subsequently switched energy suppliers, in some instances the SMETS1 meter would lose its smart functionality, meaning it was no longer able to provide information on energy usage or provide automatic readings to the supplier. A second-generation smart meter, known as a SMETS2 meter, was subsequently developed which is cross-compatible with all suppliers so that when a consumer switches supplier they do not lose smart functionality.

34. Mr Hargreaves went on to explain the development of the smart meter roll out with larger suppliers providing annual milestones, which are then monitored.

35. In relation to enforcement of the milestones Mr Hargreaves described possible routes from informal resolution to a contested investigation. Enforcement Guidelines are issued

which set out the processes for deciding whether to open an investigation and whether to take enforcement action.

36. His statement dealt with these in much detail. Ofgem has an Enforcement Oversight Board (EOB) which provides strategic advice and decides, as in Scottish Power's case in relation to annual milestone obligations, whether to open an investigation. Detailed guidance, but not exhaustive, as to when and how an investigation is opened is provided in the Enforcement Guidelines. When an investigation is opened the formal enforcement process begins.
37. Mr Hargreaves explained that information is disclosed, at different points of the process, to the regulated person (Scottish Power) and sometimes more widely published. He says that 'Ofgem's enforcement processes provide the party under investigation with ample opportunity to see the evidence and a 'fair hearing' and further disclosure 'would' disrupt the process, and 'could' be confusing.
38. Mr Hargreaves explained how the processes were instigated in relation to Scottish Power. Scottish Power were told in July 2020 that Ofgem considered Scottish Power to be in breach of its annual milestones, and offered early resolution, but this was not reached. An investigation opened in November 2020, and the fact of this was published on Ofgem's website.
39. By that time the request for information had been made (7 August 2020), as described in the decision notice.
40. Mr Hargreaves addressed the various exceptions claimed by Ofgem. In relation to the course of justice exception he says that the investigation of Scottish Power was live and ongoing (even though a formal investigation was not announced until November 2020) with the summary of the investigation not published until November 2021. He said: -

One way in which disclosure of the withheld information would affect the course of justice is through the potential to impact the alternative action process and any future stages of the enforcement process including settlement and contest.

It is also important for the Tribunal to understand that the decision-making in this case was focused on identifying enforcement priorities. There were more suppliers that had not fulfilled their Annual Milestone Obligations; however they were not considered to be an enforcement priority for Ofgem. Due to resources,

it is not possible for each and every case to be considered for enforcement action.

41. Mr Hargreaves was also concerned that disclosure would have an effect on future investigation in relation to smart meter rollout. Essentially Mr Hargreaves was concerned that disclosure of the information requested will alert suppliers as to Ofgem's approach to enforcement and the thresholds for action which it has adopted (especially in the context of Ofgem's finite resources):-

Ofgem relies on the fact that suppliers will comply with their obligations based in part on the latent threat of enforcement action. The more suppliers know about the basis on which Ofgem will, or will not, take enforcement action, the more scope there is for suppliers to undertake a cost benefit analysis on whether it is worth complying. This would lead to a poor and inconsistent service being provided to consumers.

...

Revealing information about the criteria relied upon, in this instance, by Ofgem to take enforcement action would encourage suppliers to do the "bare minimum" needed to avoid enforcement action, rather than striving to meet all of their obligations. Specifically, if suppliers are aware of the bare minimum, they need to achieve to avoid enforcement action or, even in general terms, the threshold for enforcement action, then that becomes the new target, rather than the targets set out in the licence obligations.

42. Mr Hargreaves also argued that disclosure will have an effect on full and frank advice being given in relation to enforcement and the process will become less effective as a result, including (i) damaging the ability to deal with enforcement issues less formally at an early stage when decisions as to whether to investigate are being taken, (ii) damaging the process whereby Ofgem obtains information informally from suppliers, who would not expect the information to be disclosed, and (iii) unnecessarily revealing Ofgem's early thinking on an individual case:-

...taking these points together, disclosure would adversely affect the ongoing investigation process into SP's compliance with the Annual Milestone Obligations, as well as future investigations, including, but not limited to, investigations into the ARS Obligations, and other smart metering compliance obligations. By this I mean that the adverse impact on Ofgem's ability to conduct a statutory investigation, both of SP and in the case of future investigations, is more likely than not to occur.

43. Whilst accepting public interest in disclosure for the purposes of transparency, Mr Hargreaves expressed the view that a lot of information is already published and that disclosure of the withheld information would not, in fact, be in the public interest.
44. He argued that disclosure of early thinking and analysis by Ofgem could lead to confusion and misinterpretation. He disputed whether Scottish Power's interest in disclosure is a public interest, rather than Scottish Power's own interest and benefit. Scottish Power can pursue its own case in the enforcement proceedings, during which information will be disclosed to it. There is a strong public interest he said in Ofgem carrying out its enforcement functions effectively, and for this not to be prejudiced.
45. Mr Hargreaves next addressed the internal communications exception. He said that all the withheld information amounts to internal communications and so most of what he says refers to the public interest test. While recognising the public interest in transparency (as for the previous exception) Mr Hargreaves argued: -

There is a particular need for free and frank advice in the context of enforcement decisions. Ofgem's safe space to consider – openly and fully – decisions around whether or not to open an investigation would be damaged if the withheld information is disclosed. Ofgem employees need this safe space for deliberation and analysis, and away from external interference and distraction.

The need for free and frank advice was particularly engaged here given that the investigation into SP was live – and indeed only beginning – at the point of the response to the Request.

46. Mr Hargreaves raised further concerns about disclosure of the communications, and the prospect that this will lead to voluminous correspondence and representations and a reluctance of suppliers to provide Ofgem with information if communications about it will then be disclosed. Finally, Mr Hargreaves said that some of the information would also attract the commercial confidentiality exception in the EIR.
47. Mr Hargreaves answered questions in both open and closed sessions about the contents of his witness statement and stood by its contents.
48. In the closed session Mr Hargreaves gave further evidence in relation to the withheld material and the Tribunal heard closed submissions. A 'gist' of this part of the proceedings was prepared and is annexed to this decision as appendix 1. As a result of discussions in

the closed session, a number of previously redacted paragraphs of Mr Hargreaves' statement were made available in a fully open format.

DISCUSSION

49. A feature of this case was the extensive reference in questioning and written and oral submissions which examined the minutiae of the relationship between Scottish Power and Ofgem and the details of the dispute which exists between them about whether it is appropriate for Scottish Power to face potential sanctions from Ofgem when other providers do not.
50. At times in the hearing, it was very unclear how Scottish Power's approach could assist the Tribunal in its task of deciding whether exceptions claimed had correctly been applied. As we understood it, the main thrust of Scottish Power's approach was that to the extent that Ofgem's decision-making had unfairly (in its view) targeted Scottish Power, then that would increase the public interest in disclosure of the information.
51. This Tribunal is ill-equipped to reach any findings on the issues between Scottish Power and Ofgem, although there may well be other fora in which the issues are ultimately played out. It seems to us that the most we can do is to note that the requests were made in the context of Scottish Power feeling significant grievance about decisions made about the opening of enforcement proceedings against it but not against other suppliers and seeking to understand the rationale behind the decisions made.
52. The Tribunal has in mind Scottish Power's three grounds of appeal in this case which were, of course, focused on the Commissioner's decision notice. The Tribunal is, however, considering the matter afresh and has decided to take a somewhat different route to reaching its conclusion.
53. The Tribunal will start by considering the first ground of appeal that 'the Commissioner fundamentally misunderstood the scope of the request'.
54. The Tribunal will then consider the exception claimed by Ofgem pursuant to regulation 12(4)(e) EIR, namely that the request involves the disclosure of internal communications,

and whether (if that is the case) the public interest balance favours maintaining the exception.

55. Next, the Tribunal will consider whether the exception under regulation 12(5)(b) EIR (the course of justice etc. exemption) is engaged at the “would adversely affect” standard and (if it is) whether the public interest balance favours maintaining the exception (essentially Scottish Power’s second and third grounds of appeal).

56. Given the conclusions that it has reached on these issues, the Tribunal does not find it necessary to go on and consider the exception under regulation 12(5)(d) EIR (the confidentiality exception).

Whether the Commissioner misunderstood the scope of the request

57. The Tribunal accepts the explanation provided by the Commissioner in response to this appeal (as set out above) that in fact the Commissioner’s decision notice did concern all the information withheld relating to the request as a whole. The Tribunal agrees with the Commissioner’s assessment that the withheld information in this case, which the Tribunal has seen, but Scottish Power has not, comprises of materials generated by Ofgem in order to assess the compliance of various energy providers against the annual milestones they had set themselves and to determine whether any sanctions were appropriate for those providers who had failed to meet their targets.

58. In any event the Tribunal is considering the matter afresh and has considered all the withheld material which is available to the Tribunal.

Regulation 12(4)(e) EIR – internal communications

59. Although the Commissioner focused in her decision on the exception in reg 12(5)(b) EIR (relating to the adverse effect on the ability of Ofgem to conduct out an inquiry), having viewed the closed material it seemed to the Tribunal that the most obvious place to start was considering the application of the exception relating to internal communications. In our view all the closed material would come under this description.

60. The real issue in relation to this exception is whether the public interest in withholding the information outweighs the public interest in disclosure.
61. Ofgem relies on a ‘safe space’ argument to justify not disclosing the information. The Tribunal takes the view that any such claim must be considered with some care and takes the general view (as reflected in the case law) that officials should be expected to carry out their functions fully and diligently whether or not there is a risk that internal communications will be disclosed (and there always is such a risk under the EIR and FOIA).
62. However, as Ofgem says, in some circumstances, the need for free and frank advice and discussion needs to be protected. We are considering a situation where, at the time of the response to the request, a decision had not yet been announced to carry out an investigation. We are of the view that the same, or similar, considerations apply at this stage of the process as would have been applied once the investigation had been commenced, and that Scottish Power’s attempt to draw a distinction between the two stages was misconceived. We form that opinion having considered the nature of the material which makes up the withheld information.
63. Thus, at the time the request was responded to this was a live and ongoing enforcement process. As the ICO Guidance says: - “if the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight’. Especially at the early stages of the process (as this was) it seems to us that Ofgem officials need a ‘safe space’ to have frank discussions as to whether discretionary enforcement proceedings are appropriate or not, without the risk of documents reflecting these early views being open to scrutiny and indeed potential challenge at a time when final decisions have not yet been made.
64. Ofgem also claims that providers will be less forthcoming with Ofgem out of fear that the information could be publicly disclosed. We note that concern, but it is speculative, and we give it little weight in our consideration.
65. Whilst we understand Scottish Power’s desire to have the greatest amount of information available about a process which it feels is leading to an injustice, and accept that disclosure will lead to further openness and transparency about Ofgem’s processes, it does seem to

us that the public interest is met to a large extent by the publicly available detailed guidance on the criteria considered by Ofgem when deciding whether or not to open an investigation. Further Ofgem provides parties with significant information by way of analysis and findings as part of the enforcement process. The way this case was argued before us shows that Scottish Power has a very personal and specific interest in the information it has sought and, although disclosure undoubtedly has potential relevance for others, that wider public interest does not carry the weight that Scottish Power submits.

66. In our view, in relation to this exception , (i) the need for Ofgem officials to have the freedom to discuss enforcement and strategic options at an early stage of the process, free from premature interjections from third parties; (ii) the amount of material already available about the processes; and (iii) the narrow interests of Scottish Power mean that the public interest balance is in favour of maintaining the exception .

67. We bear in mind the presumption in favour of disclosure contained in the EIR but find that the balance is strongly in favour of non-disclosure in this case such that the presumption is overridden and is not determinative of the issue.

Regulation 12(5)(b) EIR – course of justice exemption

68. Having reached those conclusions in relation to the internal communications exception, it is not strictly necessary for the Tribunal to go on and consider further exceptions. However, as the Commissioner’s decision notice concentrated on the exception in reg 12(5)(b) EIR it seems right for the Tribunal to consider it also.

69. Scottish Power challenges the Commissioner’s finding that disclosure of the withheld information “would adversely affect” Ofgem’s investigations, and enforcement actions, for the purposes of this exception. Ofgem claims that it offered clear and convincing evidence that disclosure would adversely affect the course of justice, prejudice its ability to gather facts and evidence and operate an effective enforcement process.

70. We have read Mr Hargreaves’ long statement, and we have heard oral evidence in open and closed sessions. We accept that he has given evidence that disclosure of the withheld information would adversely affect Ofgem’s investigations and enforcement actions, and

we accept the content of his evidence to this effect. It does not seem to us, as claimed by Scottish Power, that he has overstated the risks in reaching this conclusion. He has been careful to indicate where, in his view, the adverse effect ‘could’ happen, but his overall conclusion is that there would be an adverse effect caused by disclosure.

71. First of all, we note that at the time of the response to the request, a decision had not been taken to undertake an investigation, but we accept (as already referred to above) that the same or similar considerations would be taken into account whatever stage the potential or actual investigation had reached. We also take into account that the information withheld is preliminary and does not relate to a full investigation, and that disclosure would wrongly lead to concentration on these initial steps in the enforcement process.
72. Next, we accept the evidence that at the time of the response (4 September 2020) there was potential for future investigations involving the ARS obligation and the annual milestone obligation, and that there was overlap between the two issues.
73. We also accept Ofgem’s evidence, having seen the withheld material, that disclosure would reveal information about a threshold level at which Ofgem would initiate enforcement action, given a number of factors, including Ofgem’s limited resources. In our view, it seems obvious that this would be information which would have the potential to be exploited by suppliers who may be interested, in some cases, in doing the minimum to avoid enforcement action. Disclosure would adversely affect Ofgem’s ability to most effectively deliver enforcement action and investigations in an environment where some suppliers would feel more able to calculate compliance risk. On the evidence we have read and heard from Mr Hargreaves we do not think that he has overstated these risks.
74. Further, we have already considered the need for Ofgem officials to be able to give full and frank advice during the investigation process (and we refer back to those passages above) and in our view a diminution of this ability because of the risk of disclosure would also adversely affect the investigation and enforcement processes of Ofgem.
75. For those reasons we find that the exception in regulation 12(5)(b) EIR also applies in this case, and therefore, once again we need to consider the public interest balance.

76. We accept that there is a public interest in transparency with respect to Ofgem's decisions to open enforcement investigations, but as Ofgem argue (and as referred to above) this is largely addressed through disclosure by Ofgem of the basis on which it takes enforcement action, which is outlined in the Enforcement Guidelines.
77. In addition, Ofgem publishes its decisions to open, and close, investigations and the basis on which these decisions were taken. If enforcement action is ultimately taken, the nature of that action will, again, be published on Ofgem's website. Additionally, Ofgem has a statutory obligation to consult prior to making provisional or final enforcement orders or taking decisions on penalties.
78. In our view, a factor in favour of non-disclosure is the potential adverse impact on Ofgem's investigatory and enforcement functions, which we have already found will be caused. In the current case, Scottish Power has been provided with a significant amount of information which relates to Ofgem's enforcement decision making. We accept Ofgem's argument that to disclose further detail of the process would have the potential to disrupt the process. We also accept that to the extent Scottish Power wishes to argue that it should not be the subject of enforcement action, it can do so in the ongoing enforcement proceedings.
79. Scottish Power focuses on Ofgem's obligations to be transparent, accountable and consistent but as Mr Hargreaves says in his witness statement (and we agree):

I do not accept that Ofgem's obligation to be transparent, and accountable, with respect to our enforcement powers is fulfilled by disclosure of the minutiae of our decision-making. Rather, the keyway of meeting these obligations is through the processes described above – the publication of information about the enforcement actions we take, and the Ofgem Enforcement Guidelines

80. Overall, and bearing in mind the importance of ensuring the effectiveness of enforcement proceedings and the other factors set out above, we find that the balance in this case comes down significantly in favour of non-disclosure. We also bear in mind the presumption in favour of disclosure contained in the EIR but find that as the balance is strongly in favour of non-disclosure in this case, that the presumption is overridden and is not determinative of the issue.

Regulation 12(5)(d) EIR – confidentiality

81. Ofgem’s case is that a subset of the withheld information would also be covered by this exception. However, having already found that the material is covered by two other exceptions in the EIR, the Tribunal does not need to make a decision on this issue.

CONCLUSION

82. Taking into account all of the above, this appeal is dismissed.

Stephen Cragg KC

Judge of the First-tier Tribunal

Date: 2 March 2023

Appendix 1 – Gist of closed session on 6 September 2022

1. The CLOSED session commenced at 15:15.
2. Charles Hargreaves (“CH”) provided an overview of the withheld documents.
3. CH was taken through each of the CLOSED elements of his witness statement. To the extent these discussions were made by reference to the withheld information, this was considered along side his witness statement.
4. Three sections of his witness statement were identified as potentially subject to disclosing into OPEN.

Paragraph 58

Paragraph 67

Paragraph 79

5. After the end of the CLOSED session, Ofgem confirmed that these sections could be provided in OPEN. These are attached as Annex A.
6. CH discussed the alternative action process. He explained that this is intended to be a relative speedy process, in contrast to the more deliberative process of settlement and contested action. At the alternative action stage, Ofgem has not yet opened an investigation and is proceeding on the basis only of the information provided by licensees.
7. In contrast, the settlement process takes more time, and is based on an investigation and understanding of why the supplier did not comply with his license obligation.
8. CH explained how disclosure of the withheld information would have affected the alternative action process.
9. CH was asked if an outcome of alternative action was to inform consumers that Ofgem and the supplier had reached a conclusion that there appeared to be a breach, and that there were consequences which flowed from that. CH stated that he considered the goals were broader, and an announcement of alternative action was intended to signal, to industry, that they were expected to comply with all licence obligations.
10. CH stated that the 2019 Milestone Obligation is a binary obligation. There are, broadly, only two reasons for non-compliance: (1) did not put in place a system for compliance; or (2) did not monitor and react to the system for compliance. If a company is not willing to accept a breach, by way of alternative action, Ofgem needs to act to demonstrate, to consumers, that it took non-compliance seriously.

11. CH was asked if suppliers, who were sophisticated market participants, will know that there cannot be a threshold, because there will be a number of factors which will be taken into consideration. CH stated that this may be the case for some suppliers, but that disclosing the withheld information will still provide an appearance of a threshold, which is unhelpful, as the key message must be that if you are non-compliant you can face enforcement. It is important to remember that smart meters are part of the net zero strategy, and non-compliance slows down achievement of this goal.
12. CH was asked why suppliers may wish to limit the number of smart meters installed. He explained that this means that suppliers could defer expenditure into the future.
13. The withheld information included information regarding a number of companies, not simply Scottish Power (“SP”). The Tribunal were informed where the companies had, when providing the information to Ofgem, indicated that the material should be treated as confidential information.
14. The questions provided by SP were considered. It was noted that these were not all plainly CLOSED questions, or questions which had not already been asked. However, they were put to CH by reference to the withheld material.
15. CH confirmed that Ofgem did take into account matters outside SP’s control. However, there was a dispute around what is in fact outside of a company’s control. Some of the factor’s SP considered as outside of their control were in fact risks they had to manage, and companies should have systems to manage compliance, and be able to take steps to bring into compliance.
16. CH was asked if disclosure of the withheld information could have, as suggested by Claire Skelton, promoted alternative action. CH stated this was difficult for him to offer an opinion on this but that currently SP’s argument was very narrow, and only around SMETS1, so that appeared unlikely.
17. CH explained for major suppliers that reputational damage can be taken as seriously as a fine.
18. The CLOSED session ended at 16:45.

