First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0001V

Before
Judge Stephen Cragg Q.C.

Heard via the CVP Platform on 14 January 2021

Between

Alastair Tibbitt

Appellant

and

The Information Commissioner

And

Office of Gas & Electricity Markets (OFGEM)

Respondents

The Appellant represented himself

The Commissioner was not represented

OFGEM was represented by Mr Peter Lockley

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. 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.

3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.

4. The Tribunal considered an agreed open bundle of evidence comprising 128 pages, an additional bundle of 187 pages and assorted schedules and additional documents.

BACKGROUND AND DECISION NOTIC

5. On 26 February 2019, the Appellant wrote to the Office of Gas and Electricity Markets (Ofgem) and requested information in the following terms:-

> "…an itemised breakdown of all payments made under the non-domestic renewable heat initiative [RHI] over the last three years, broken down by year and recipient?
>
> Please include the following details for each recipient, where known:
>
> 1. Company / Organisation name.
>
> 2. Registration name.
>
> 3. Installation address.
>
> 4. Registered organisation address (if different.)
>
> 5. Amount received in each of the last three years for which information is available.
>
> 6. UK country (England / Wales / Scotland.)"

6. Ofgem responded on 27 March 2019. It disclosed a breakdown of all non-domestic RHI quarterly payments made over the last three years, including the start and end dates for each quarterly period, the amount paid, an abbreviated post code and country. It substituted the RHI reference numbers for random reference numbers, advising the Appellant that the true reference and the full postcode was personal data and exempt under regulation 13 of the EIR.

7. The Appellant requested an internal review on 27 March 2019. He stated that he was unhappy that the company/organisation receiving the payments had been redacted and the postcode information relating to a company.

8. Ofgem carried out an internal review and notified the Appellant of its findings on 28 May 2019. It informed the complainant that it now wished to rely on regulation 12(4)(b) EIR on the grounds of cost.

9. Regulation 12(4)(b) EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. In this case Ofgem is citing regulation 12(4)(b) EIR due to the burden the request would place on it if it were to be fulfilled.

10. Thus, regulation 5 EIR obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIR. Regulation 12 EIR provides, insofar as relevant:

> "(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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–
….
(b) the request for information is manifestly unreasonable".

11. Under the EIR a public authority can take into account the time and cost involved in redacting exempt information, whereas under FOIA this is not a permittable task. However, it should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information: see the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019

12. The Information Commissioner produced a decision notice dated 9 December 2019. At paragraph 17 the Commissioner states:-

> 17. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will consider the following factors:
>
> • Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
>
> • The nature of the request and any wider value in the requested information being made publicly available.
>
> • The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
>
> • The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
>
> • The presumption in favour of disclosure under Regulation 12(2).
>
> • The requirement to interpret the exception restrictively.

13. The Commissioner also sets out her understanding of the difficulties that OFGEM says it faces as follows:-

> 18. Ofgem has said that it is fairly quick and simple to produce an excel document of the requested information from its information management system. The issue is then having to manually check this information to redact personal data under regulation 13 of the EIR.
>
> 19. It explained that the RHI scheme is frequently referred to as the "nondomestic RHI scheme". This is to distinguish it from a similar scheme, which is exclusively available to owners or occupiers of single domestic premises. However, it said that it is relevant to this request that under RHI scheme heat may be supported if it is supplied to two or more domestic premises. Or, if the heat is supplied to single domestic premises and for other uses (such as also heating business premises, or also used in connection with a process carried out by the participant such as drying or cleaning). It stated that examples of heating installations within the latter category include those providing heat used in farmhouses and farm buildings (such as poultry sheds) and heat that is used in bed and breakfast accommodation.
>
> 20. Ofgem additionally explained that any individual RHI scheme participant may be accredited in respect of more than one heating installation – where this is the case, each installation will be the subject of an individual entry in the data set that it maintains. Installations in common ownerships may be located at different premises and are administered using different references.
>
> 21. Dealing with names first, Ofgem confirmed that the relevant data set includes 20,980 names. It reviewed 100 names and identified and recorded whether or not they appeared to be those of living individuals. It advised that this exercise took an average of 3 seconds per name, which equates to 17.5 hours in total for all names.
>
> 22. This assessment identified 3% that were obviously not living individuals – so those relating to schools, hospitals, some obvious businesses, limited companies and non-profit organisations. It stated that 3% of the 20,980 data set is 629.
>
> 23. It also identified 68 biomethane installations which it stated could be excluded from consideration because no biomethane facility would be at a residential address.
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> 24. Ofgem advised that 20,980 minus 68 minus 629 equates to 20,283 and this would be the amount of addresses that would then need to be checked. Ofgem carried out a sampling exercise of 11 entries

looking at the addresses of heating installations and scheme participants' correspondence addresses simultaneously. It pointed out that these two addresses are sometimes the same.

25. It first checked if there is a council tax record for the address using the VOA and SAA website. If that search resulted in records being identified Ofgem assessed the address as relating to domestic premises. These would be redacted. If no council tax record for the recorded address could be identified it then checked whether there is a business rates record for the property, using the same website. If that search resulted in records being identified the address was assessed as not relating to domestic purposes. If there was no council tax or business rates record identified, the entry would need to be marked for further assessment.

26. Ofgem stated that this exercise resulted in an average of 4 minutes and 2 seconds being required to conduct the address checks for participant and installation addresses for each installation reviewed. Given that it would need to check 20,283 entries, it estimated that this task would take 1363 hours and 30 minutes to complete.

27. It would then be faced with another task of reviewing those entries that do have a business rates record where it is not obvious that the entry relates to a limited company. If the entry relates to a soletrader (and it would have to identify those) it, too, would be redacted under regulation 13 of the EIR. No estimate has been provided for this. But the Commissioner does not consider that this is necessary considering the scale of the task and the significant amount of hours that would be involved in the tasks required beforehand.

14. As a result of this analysis the Commissioner concluded:-

Ofgem has demonstrated that compliance would take over 1300 hours. The Commissioner considers this is sufficient to demonstrate that the complainant's request is manifestly unreasonable and that regulation 12(4)(b) of the EIR applies. The Commissioner wishes to make the point that even if the estimate is excessive and the time is halved or even quartered, it would still equate to over 650 hours or over 325 hours respectively, both of which would still be considered manifestly unreasonable.

14. All the exceptions in the EIR are subject to a public interest test. The Commissioner considered the public interest in transparency,

accountability and providing access to information which enables members of the public to understand more clearly how such schemes operate, the cost to the public purse and allow them to assess for themselves whether they are beneficial, sustainable and offer value for money.

15. However, the Commissioner considered the overwhelming and unreasonable burden compliance would cause Ofgem, outweighed any public interest factors in favour of disclosure. The presumption in favour of disclosure did not change this conclusion.

THE APPEAL

16. On 30 December 2018 the Appellant submitted an appeal which states, in summary:-

> The Commissioner 'does not appear to have independently assessed the structure of date held by Ofgem, to ascertain whether there may be a more straight forwards way to provide the data I requested in a more cost-effective manner.
>
> …it would not be costly at all for Ofgem to identify the records in the relevant data set that contain a corporate registration number. Whilst the resulting data would still need some cursory checks, the overly laborious process set out by Ofgem and accepted by the ICO would not be necessary. Such an approach would automatically exclude the likes of sole traders, for example.
>
> I should also add that I subsequently offered to narrow my request so that it covered only corporate recipients of non-domestic RHI in Scotland. This reduces the maximum number of installations to be considered to 3328 – a considerable reduction from the 20,283 cases that fell within the original scope of my request.

17. The outcome sought by the Appellant effectively narrows the Appellant's case to Scottish cases when he states that:-

> I would like OFGEM to supply me with a spreadsheet containing the requested information on corporate entities in Scotland that have received non-domestic RHI subsidy'.

18. Ofgem responded to the appeal and explained:-

> The RHI scheme is colloquially known as the Non-domestic RHI scheme. This is to distinguish it from a similar scheme, the 'Domestic RHI', which is exclusively available to owners or occupiers of single domestic premises. However, it is relevant to this Appeal that under the RHI scheme, heat may be supported if it is supplied to two or more domestic premises. Alternatively, heat can be supported if it is supplied to single domestic premises and is also to be used for other purposes (such as heating business premises, or a process carried out by the participant such as drying or cleaning). Common examples of heating installations within the latter category are those providing heat used in farmhouses and farm buildings (such as poultry sheds), or heat that is used in bed and breakfast accommodation.
>
> It is important to emphasise that Ofgem is not required to determine whether an applicant is an individual, a corporation, a sole trader or a partnership. That is simply irrelevant to eligibility under the scheme, and because it is not a matter of concern to Ofgem, it is not a matter about which Ofgem collects information. Furthermore, as a result of the lack of differentiation between organisations, and individuals applying to the RHI, and the considerable variation types of heat demand on the scheme, it is often not apparent from looking at a record whether or not it is located at a domestic property.

19. Ofgem sets out its understanding of the Appellant's appeal as follows, noting that the Appellant has not challenged the calculations and result achieved by Ofgem:-

> …he asserts that there is a different and quicker way to achieve the same result. In the Grounds of Appeal he notes…that on the page where Ofgem collects information about applicants, there is a box to insert the Corporate Reference Number ("CRN"). He states that if entries on the Database were filtered, so that the starting point for a manual review would be all entries that include a CRN, then 'whilst the resulting data would still need some cursory checks, the

overly laborious process set-out by OFGEM and accepted by the ICO would not be necessary'.

20. Ofgem considers this issue as follows:-

> 19. It is correct that Ofgem would be able quickly to interrogate the Database and export to an Excel spreadsheet only those entries for which the applicant has provided a CRN. For Scotland, this would result in a list of approximately 1052 installations located in Scotland, alternatively 1,300 recipients who are located in Scotland, where a CRN was provided with the application.
>
> 20. The Appellant states that this would result in some 'false positives'. This is correct: the field is optional and a significant number of corporate bodies simply omit this information. To test the size of this effect, Ofgem sampled 10 entries who had not included a CRN. Two appear to be corporate entities, an error rate of 20%. Ofgem submits that with such a significant error rate, it is not possible simply to exclude such 'false positives'. In order to comply with the Request as submitted (and as subsequently narrowed to Scotland only), Ofgem would be required to carry out a manual review of all those entries without a CRN (some 2,870 entries).
>
> 21. Of more concern still are the 'false negatives' – cases where living individuals are identifiable from the requested information, even though a CRN has been supplied with the entry. This may occur where, for instance, a farmer sets up a limited company. To test the size of this effect, Ofgem sampled 10 entries who had included a CRN. Some 3 appear to relate to identifiable living individuals, an error rate of 30%. This is a significant error rate (implying some 390 entries incorporating personal data would be released, were all entries with a CRN disclosed). Ofgem submits that to disclose this data without more would be a breach of data protection legislation, and so even if it applied a CRN filter, it would still be required to carry out a manual review of all entries with a CRN (some 1,300 entries).
>
> 22. The error rates for both false positives and false negatives are therefore significant enough that Ofgem would still have to carry out manual checks of all RHI recipients in Scotland. It follows that the method proposed by the Appellant of filtering the information,

so as to focus only on those entries with a CRN number, would not reduce the time it would take to comply with the Request.

23. As Ofgem submitted to the Commissioner, and the Commissioner accepted in the DN, that task would take some 200 hours. For all the reasons in the DN, a request that poses such a large time burden is manifestly unreasonable (see further paras 27-31 below).

21. Thus Ofgem's case is that, adopting the Appellant's suggestion does not provide a quicker way of providing the Appellant with the information he has requested. This is, in essence, because even using the CRN method, additional checks will need to be carried out on the results to discover if there is any personal information which should not be disclosed, because sampling of the data has found that in a significant number of cases, that will be an issue. Therefore, Ofgem stands by the methodology it has used and as assessed by the Commissioner, which leads to and excessively burdensome amount of time for Ofgem - even when the searches are limited to Scotland.

22. For the appeal hearing the parties agree that the request (as narrowed by the Appellant) applies to non-domestic RHI scheme participants who are recorded by Ofgem as being located in Scotland. Ofgem produced the following summary of the issues, which was not opposed by the Appellant.

23. Ofgem submitted two witness statements for the appeal. Emma Fairley has been a Senior Operations Manager since 2019 with Ofgem. She confirmed that based on her experience of using the relevant information management systems, it was her view that the approach used by Ofgem in the sampling exercise, as explained to the Commissioner and set out in the decision notice was the most appropriate method of addressing the request. Narrowing the request to Scotland she explained:-

34…Ofgem identified that there were 3,328 heating plants that corresponded to such a request. Ofgem further identified that it anticipated that it would take 6.8 minutes to assess each of those entries.

35… In terms of the process, I have made enquiries of colleagues and can say that Qlikview would have been used to identify addresses in Scotland only (CRM does not offer that functionality)….Applying that methodology to the 3,328 heating plants identified…:

a. Assessing names: 3 seconds. 9,984 seconds total.

b. Assume 3% of the data set obviously does not involve personal data: 100 heating plants that should be discounted from assessments of addresses.

c. Assessing addresses for the remaining 3,228 remaining installations: 242 seconds each. 781,176 seconds total.

d. Assume 38% of 3,328 cases involve personal data and are withheld for release: 1,265 heating plants.

e. Representation process for the remaining 2,063 cases: 276 seconds each. 569,388 seconds total.

f. Total: 1,360,548 seconds, or 377.93 hours. This produces an average of 409 seconds (or 6.8 minutes) for each entry.

36. The figures as provided to the Appellant in relation to the narrowed request do not include the additional time that Ofgem anticipated incurring in providing checks and assurance in relation to some of the steps required for assessing whether addresses are residential.

24. Ms Fairley also explained that

40. In the course of preparing its response to the Appeal, in order to respond to the Appellant's suggestion that the exercise of separating personal data could be made significantly faster by applying a filter to include only those cases where a CRN was supplied, I understand that Ofgem carried out an analysis of a sample of cases in which no CRN was supplied, and cases in which a CRN was supplied. This analysis was conducted by a colleague who has since left Ofgem. On the basis of the information provided at paragraphs 19 to 23 of Ofgem's Response to the Appeal, I understand that the analysis identified error rates of 20% and 30% respectively, and an attendant risk of the unlawful release of RHI

scheme participants' personal data in relation to the latter category of cases, which Ofgem regards (and I regard) as unacceptable. For the reasons stated in the Response, preparing reports by reference to the CRN field will not reliably identify names of RHI scheme participants that are not living individuals. Any reports or information extracted by reference to the CRN data field would need to be manually cross-checked by a member of Ofgem staff to ascertain whether or not it is accurate.

25. There was a further witness statement from Michael Knight who is a Principal Legal Adviser in Ofgem's Office of General Counsel, with experience of advising on the RHI scheme. He added a slight revision to the figures set out by Ms Fairley as follows:-

> 13. As at 14 October 2019 there were 3,585 installations accredited to the RHI scheme for which Ofgem had recorded that the relevant participant is located in Scotland.
>
> 14. As at 16 December 2020 there were 3,763 installations accredited to the RHI scheme for which Ofgem had recorded that the relevant participant is located in Scotland.
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> 15. I cannot explain why my former colleagues reached the 3,328 figure that was used in Ofgem's 14 October 2019 communication to the Appellant. The answer to this would depend on a number of variables, including (for example) the date on which the information they used was extracted from Ofgem's database. In this latter respect, it is possible that the lower figure arose because my former colleagues used a database extract taken on or any time after the Appellant's request was first received, but before 14 October 2019. This is because the numbers of participants accredited to the RHI scheme is, from time to time, increasing - and so an earlier data extract would contain fewer participants than a later one.

26. These figures lead to a slight increase in time estimates provided by Ms Fairley as set out above. Mr Knight says:-

> At paragraph 35 of her witness statement (page 28 of the supplementary bundle), Ms. Fairley discusses the time estimate provided to the Appellant in Ofgem's 14 October 2019. She uses the 3,328 figure for those purposes. I am familiar with the calculation that Ms. Fairley performed. Had she used the 3,585 figure the

overall time required for would have been 402 hours and not the 377.93 hours stated.

27. Ofgem points out that these timings do not take account of any time it would take to consider the application of other exceptions under the EIR once personal information had been removed.

THE HEARING

28. The hearing of this appeal took place via the CVP platform and the Appellant represented himself. The Commissioner was not represented and Mr Lockley represented Ofgem.

29. The Appellant indicated that he did not take issue with the contents of the witness statements of Ms Fairley and Mr Knight. He also made it clear that he was not interested in obtaining personal data about those who were receiving subsidies under the RHI scheme.

30. He said that the CRN number available in Ofgem's records led to information that was already available on the Companies House register. If there were concerns that not all those companies who received subsidies would be revealed by interrogating the CRN information held by OFGEM, the Appellant said that he would be prepared to accept the partial data available as the result of a CRN search.

31. He explained the public interest in receiving the information sought. The Appellant is a journalist who deals with data issues. He was aware of a number of companies in the Aberdeen area who had applied for the RHI subsidy but did not have planning permission to build the facility. Access to the names and details of organisations on the Ofgem database would allow him to check against planning records to see if other companies

were in the same position. It would also be possible to investigate and cross-reference the Ofgem records with DEFRA records relating to farm subsidies, for example, and those companies who might be receiving subsidies from the public funds who were also using tax havens. For this it was not sufficient to have the more general information provided by Ofgem, and he needed to be able to identify specific companies from the CRN information.

32. Mr Knight gave evidence to the Tribunal on behalf of Ofgem and confirmed the contents of his statement.

33. He explained three situations where using the CRN filter suggested by the Appellant did not assist in providing a short-cut to the information provision by Ofgem as suggested by the Appellant.

34. Firstly, some companies did not fill in the CRN section of the application form when applying under the RHI scheme. The box was optional. Therefore, a search which used the CRN as a filter would not reveal some of the information requested by the Appellant.

35. Secondly, analysis indicated that a proportion of non-corporate applicants entered information into the CRN section even if they did not have a company number. Thus, the CRN filter would be likely to reveal the personal information of these people unless there was an additional manual check.

36. Thirdly, there were some corporate entries in the CRN section which also revealed personal information which would not be available from Companies House. An example would be where a farm was run as a limited company with a registration address which might be that of an accountant or a solicitor, but the information held by Ofgem would also reveal the address of the farm which might be the farmer's home, and so represent the personal data of the farmer.

37. Thus it was submitted that pursuing the Appellant's suggested route for obtaining the requested information did not have the benefits claimed by the Appellant, as significant checks for personal information would still have to be carried out into each applicant revealed using the CRN filter, and the use of the CRN filter would not identify all the information sought by the Appellant in any event.

DISCUSSION

38. In this case the real issue is that Ofgem does not hold the information sought in a format which is easily accessible so that it can be provided without revealing personal data. As explained to the Tribunal this is because it does not matter to Ofgem whether an applicant is incorporated or not, and so there is nothing in the data retention system which separates personal applicants from corporate applicants, or ensures that personal information is held separately.

39. That means that when a request such as the one made in this case is considered, there is a need for a check on each item of data (or the vast majority thereof) to ensure whether personal information will be disclosed or not.

40. There is no criticism of Ofgem for holding the information in that way, as its systems are designed to meet Ofgem's operational needs rather than to anticipate any requests under FOIA or the EIR which might be made. There is also no criticism of the Appellant for requesting the information he has sought, and he could have had no way of knowing that the information would be so difficult to compile and check.

41. However, in my view the CRN approach proposed by the Appellant is not the answer to the difficulty in this case in providing the requested information, and I accept the evidence of Ms Fairley that the approach

taken by Ofgem when calculating how long it would take to extract the requested information was reasonable and proportionate.

42. The Appellant has not challenged the amount of time estimated by Ofgem using its methods. In my view a search which would take around 400 hours is so burdensome for Ofgem (requiring additional staff time or staff members to be seconded to the task) as to make the request manifestly unreasonable for the purposes of the EIR. Even just assessing the names and addresses as set out in Ms Fairley's statement at paragraph 35(a) and (c) would take over 200 hours which in itself would make the request manifestly unreasonable for the purposes of the EIR.

43. Having reached that conclusion I must consider the competing public interest factors to decide whether the public interest in withholding the information outweighs the public interest in disclosure.

44. All parties accept that there is a public interest in the transparency of Ofgem in disclosing to whom public subsidies are made. Ofgem has provided anonymised figures which show the partial postcodes of those in receipt of subsidies, and provides quarterly figures. Ofgem argues that there is a limited public interest in providing the particularised information requested by the Appellant.

45. The Appellant is a journalist and has identified the important public interest in cross-checking the names of companies receiving the subsidy with planning and other public records. The Appellant says there are examples of companies receiving the subsidy in circumstances where questions are raised as whether this is appropriate, and he wants to investigate if there are further examples, which he can do with the requested information. He does not know, however, whether there has been any other potential abuse of the scheme.

46. These are legitimate and important public interests. However, in my view there is a strong public interest in preserving the staff time of Ofgem in

circumstances where hundreds of hours of time will be needed to meet the request. In my view the amount of time required is simply so vast as to outweigh the public interest in disclosure.

47. In my view the result remains the same even when the presumption in favour of disclosure is considered. The competing public interests in this case are not so finely balanced as to mean the presumption will tip the balance in favour of disclosure, and the evidence provided by Ofgem as to the burden is strong and uncontested, and so there are no 'benefit of the doubt' type factors to take into account when applying the presumption.

48. For the reasons set out above, the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 8 February 2021.

Amended pursuant to rule 40 on 17 February 2021