Appeal number: EA/2020/0036/V

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

BETWEEN

OFFICE OF THE GAS AND ELECTRICITY MARKETS **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

- and -

WILLIAM CRISP **Second Respondent**

TRIBUNAL: JUDGE CL GOODMAN

Remote hearing by video (V) on 18 November 2020
For the Appellant: Jennifer Thelen of counsel instructed by Ofgem
For the Respondent: Ben Mitchell of counsel
instructed by the Information Commissioner
The Second Respondent appeared in person and was unrepresented

DECISION

1. The appeal is refused. Decision Notice FS50846693 is in accordance with the law.

2. Ofgem must issue fresh responses to the Requests which do not rely on section 14(1) FOIA within 35 calendar days of the date of promulgation of this Decision.

REASONS

3. The Second Respondent ("Mr Crisp") made two requests for information to the Appellant ("Ofgem") on 10 April 2019.

4. Ofgem refused the requests on 13 May 2019 in reliance upon section 14(1) of the Freedom of Information Act 2000 ("FOIA") on the grounds that the requests were vexatious.

5. The Information Commissioner issued Decision Notice FS50846693 on 19 December 2019, finding that Ofgem was not entitled to rely on section 14(1) and requiring Ofgem to issue fresh responses to the requests which did not rely on section 14(1).

6. Ofgem appealed Decision Notice FS50846693 to the First-tier Tribunal on 16 January 2020.

7. The background to the requests is summarised below.

Background

8. Ofgem is the Office of Gas and Electricity Markets. It works in support of and is governed by the Gas and Electricity Markets Authority (GEMA), the UK's national regulatory authority for gas and electricity markets. Ofgem describes its aim as to make a positive difference for energy consumers and its principal duty as to "protect the interests of existing and future consumers". Ofgem has statutory enforcement powers and carries out investigations into and takes legal action against companies licensed under the Electricity Act 1989 and the Gas Act 1986.

9. Mr Crisp is an investigative business journalist. Around the time of the requests, he was working with several national newspapers (page 211). He sent two emails to Ofgem on 24 March 2019 asking:

> "*I would like to request a copy of all of emails received by Chief Executive Dermot Nolan in February 2019.";* and
>
> *"I would like to request a copy of all of emails received by Anthony Pygram, Director of Conduct and Enforcement, during the month of February in the year 2019."*

10. On 9 April 2019, Ofgem refused the requests under section 12 FOIA on the ground that the cost of compliance would exceed the statutory financial limit of £600.

Ofgem invited Mr Crisp to refine the requests. Mr Crisp responded on 10 April 2019 in respect of each request as follows: "*just the last three days of February then*". [I will refer to Mr Crisp's requests for copies of all emails received by Mr Nolan and Mr Pygram from 26 to 28 February 2019, as "the Requests".]

11. Ofgem advised Mr Crisp on 8 May 2019 that it judged that it would be reasonable to refuse each Request on the grounds that it was vexatious under section 14(1) FOIA because the burden of responding would cause a disproportionate and/or unjustified level of disruption. Ofgem suggested on 8 May 2019 and again on 10 May 2019 that Mr Crisp further narrow the Requests by clarifying the subject matter of interest. Mr Crisp declined, saying that he had already narrowed the Requests twice and had been advised by Ofgem that 3 days was sufficiently narrow (Ofgem dispute this – see paragraphs 49-56 of the Witness Statement of Mr Kilmartin and paragraph 46 below). Ofgem issued a formal refusal to respond to both Requests on 13 May 2019 and again, invited Mr Crisp to refine the Requests.

12. At Mr Crisp's request, Ofgem carried out an internal review. The review concluded on 28 May 2019 that Ofgem was correct to refuse the Requests as vexatious under section 14(1). Mr Crisp was again invited to narrow the Requests, both in a letter seeking representations on 21 May 2019 and in the letter of 28 May 2019. After the internal review, Ofgem moved the emails covered by the Requests to its Sharepoint document management system for safekeeping.

13. On 28 May 2019, Mr Crisp complained to the Commissioner. At her suggestion, Ofgem carried out a sampling exercise on 30 emails received by Mr Nolan and 41 received by Mr Pygram between 26-28 February 2019. The sample emails were a combination of random and representative emails.

14. In a letter to the Commissioner dated 22 November 2019, Ofgem estimated, extrapolating from the results for the sample, that it would take 1225 minutes (20 hours, 25 minutes) to retrieve, review and redact the emails received by Mr Nolan in order to respond to the first Request. The estimate was calculated as follows:

(1) Mr Nolan received 201 emails between 26-28 February;

(2) it would take on average one minute to retrieve and open each email and attachments, a total of 201 minutes;

(3) 68 emails would be subject to exemptions and it would take on average 5 minutes to decide if exemptions applied, a total of 340 minutes; and

(4) 36 emails would need redacting and redaction would take on average 19 minutes, a total of 684 minutes.

15. In relation to Mr Pygram's emails, Ofgem estimated, extrapolating from the sample, that it would take 1258 minutes (20 hours, 58 minutes) to respond to the second Request, calculated as follows:

(1) Mr Pygram received 278 emails between 26-28 February;

(2) it would take on average one minute to retrieve and open each email and attachments, a total of 278 minutes;

(3) 108 emails would be subject to exemptions and it would take on average 5 minutes to decide if exemptions applied, a total of 540 minutes; and

(4) 44 emails would need redacting and redaction would take on average 10 minutes, a total of 440 minutes.

16. Ofgem used lower multipliers than strictly suggested by the sample to estimate the number of emails likely to be subject to exemptions and redactions.

17. Ofgem added an additional hour for each Request to consult with third parties about disclosure, namely: with Government ministers and other public authorities where emails related to policy development; with regulated parties where there were statutory restrictions on disclosure (for example, under section 28 of the Electricity Act 1989); and where third-party personal data was involved. This resulted in a total estimate of 21 hours, 25 minutes for the emails received by Mr Nolan and 21 hours 58 minutes for Mr Pygram.

18. In light of the results of the sampling exercises, Ofgem maintained that each Request, considered separately, was vexatious as it would result in an unreasonable or disproportionate burden on Ofgem which was "grossly oppressive".

The Decision Notice

19. The Commissioner issued Decision Notice FS50846693 on 19 December 2019. She concluded that the Requests were not vexatious because they did not impose a grossly oppressive burden. Ofgem had allowed an unnecessary amount of time to "retrieve" the emails, an activity which should not be included in estimates for section 14 of FOIA because it was covered by section 12. While the Commissioner accepted that potentially exempt material was likely to be scattered throughout the emails, the amount of work required to "review" and "prepare" the material for each Request did not reach the high bar of being grossly oppressive. Even if the Requests were taken together, the burden was at "the lower end of the scale".

20. The Appellant appealed Decision Notice FS50846693 to the First-tier Tribunal.

The Appeal

21. Ofgem relied on two grounds of appeal. First, that the Commissioner had failed to apply the proper test in assessing whether the Requests were vexatious and in particular:

(1) the Commissioner was wrong to exclude the time taken to retrieve emails from its assessment of the burden on the basis that this was covered by section 12 FOIA. The Commissioner conceded this point before the hearing on 18 November 2020 (paragraph 1(a) of Mr Mitchell's Skeleton Argument); and

(2) the Commissioner placed too much emphasis on the burden of dealing with the Requests and failed to take into account the lack of proper purpose, the

impact on staff, the number of exemptions likely to be engaged and that the Requests were a "fishing expedition".

22. Second, the Commissioner's conclusions about the reasonableness of Ofgem's assessment of burden were unsustainable.

23. In her Response, the Commissioner disputed Ofgem's time estimates for retrieving and opening emails and attachments. The Requests did not seek a substantial amount of information such that the burden was grossly oppressive. In previous cases where the First-tier Tribunal had accepted that a burden was grossly oppressive, time estimates were more than double that in this case, even taking the Requests together. There was a serious purpose to the Requests and value in the material sought.

24. In Reply, Ofgem disputed that a snapshot of emails received over three days would reveal information of public interest and maintained that the Requests were a "fishing expedition".

25. Mr Crisp was joined as Second Respondent on 16 March 2020. His grounds for resisting the appeal were the same as the Commissioner.

26. Ofgem provided to the Tribunal lists of all the emails within scope of the Requests together with note sheets on the sampling exercise and copies of the sampled emails. On 27 October 2020, a Registrar directed that this material be held in a closed bundle pursuant to Rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and not disclosed to anyone except the Commissioner and Ofgem.

Hearing of the Appeal

27. The hearing was conducted on 18 November 2020 by a Judge sitting alone. It was appropriate to compose the panel in this way, having regard to paragraph 6(a) of the Senior President's Pilot Practice Direction of 14 September 2020 and the desirability of determining cases by the most expeditious means possible during the Coronavirus pandemic.

28. The hearing was conducted by video with participants attending from different locations. Ofgem and the Commissioner were represented by counsel, Mr Crisp represented himself. Proceedings were paused for a few minutes on a couple of occasions due to technical difficulties. Other than this, the participants confirmed that they had been able to hear and see each other throughout.

29. The Tribunal considered an open bundle of 212 pages and the closed bundle referred to in paragraph 26 above. The open bundle included a witness statement from Mr Kilmartin, a Deputy Director at Ofgem who gave oral evidence at the hearing.

30. A short-closed session was held with only Ofgem, the Commissioner and their representatives present during which Mr Mitchell cross-examined Mr Kilmartin about

the closed bundle. When the open hearing resumed, Mr Mitchell provided a summary (or "gist") of proceedings in the closed session.

The Law

31. Section 12 FOIA provides that:

> *Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

For Ofgem the appropriate limit is the same as for central Government: £600 or 24 staff hours.

32. Section 14 FOIA provides that:

> *Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

33. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal concluded that "*vexatious connotes manifestly unjustified or involving inappropriate or improper use of a formal procedure*" (at [27]).

34. The Upper Tribunal suggested four broad issues or themes to be considered when assessing vexatiousness, namely (i) the burden on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request in terms of objective public interest in the requested information, and (iv) any harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic and broad approach and especially where there is a previous course of dealings, a lack of proportionality.

35. In relation to burden, the Upper Tribunal focussed on requests where there was a previous course of dealing, while acknowledging in the context of motive that a "*single well-defined and narrow request*" may be vexatious "*if put in extremely offensive terms or... expressly made purely to cause annoyance or disruption*" (at [31]). While FOIA is "motive blind" and "applicant blind", a proper application of section 14 cannot "*side-step the question of underlying rationale or justification*" (at [35]). Reasonable and benign requests may be vexatious in the wider context of a course of dealings. However, this "*should not be seen as giving licence to public authorities to use section 14 as a means of forestalling genuine attempts to hold them to account*" (at [36]).

36. The Court of Appeal dismissed an appeal from the Upper Tribunal's decision in *Dransfield* (reported at [2015] EWCA Civ 454). The Court of Appeal found that the starting point for a consideration of vexatiousness was that there was no reasonable foundation for thinking that the information would be of value to the requester or to the public or a section of the public. Arden LJ noted that by using the word "vexatious", "*Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one and that is consistent with the constitutional*

nature of the right" and that decision makers must consider "*all the relevant circumstances*" (at [68]).

37. Arden LJ qualified the Upper Tribunal's observation that the aim of Section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" as an aim to be realised only if the high standard set by vexatiousness is satisfied (at [72]).

38. In *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 2018, the Upper Tribunal held that a compelling public interest was not a "trump card"; all the relevant circumstances must be considered. The Cabinet Office had refused as vexatious a request from an academic for the Prime Minister's Office files on relations with Libya during certain periods between 1990 and 2002. The only grounds on which the request was vexatious was in relation to the burden of complying which the Cabinet Office estimated as 80 hours. The Upper Tribunal upheld the First-tier Tribunal's decision that the request was not vexatious, referring to the Tribunal's finding that the burden was not "grossly oppressive".

39. The Commissioner has issued Guidance on Dealing with Vexatious Requests ("the Guidance") which is not binding on the Tribunal. In the Guidance, the Commissioner suggests that section 14(1) may be applied where the amount of time required to review and prepare information for disclosure would be "grossly oppressive".

40. In *Salford City Council* v *Information Commissioner* (EA/2012/0047) a First-tier Tribunal found that a request covering 2715 pages and requiring 31 days' work was vexatious because it resulted in a disproportionately high cost for minimal public benefit.

41. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

42. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law, or involved an inappropriate exercise of discretion, rests with the Appellant.

Mr Kilmartin's evidence

43. In written and oral evidence, Mr Kilmartin explained in detail how Ofgem carried out the sampling exercise described at paragraphs 13-17 above. He said that Ofgem had taken a conservative approach; for example, time had not been allowed for senior oversight of the work. "Retrieving" an email included identifying and locating it, placing it in a sub-folder, moving it from Outlook to Sharepoint, opening both the email and any attachment and checking it off against a hard copy list. In cross-examination, Mr Kilmartin explained that it took longer to open emails and attachments from Ofgem's Sharepoint storage system than Outlook.

44. Mr Kilmartin said that a number of FOIA exemptions were likely to apply, given the nature of Ofgem's statutory duties and its licensees, the seniority of Mr Nolan and Mr Pygram, and Mr Pygram's role as Director of Conduct and Enforcement. These included exemptions for law enforcement, prejudice to effective conduct of public affairs, personal data, confidential information, legal professional privilege and statutory prohibitions on disclosure. The burden of responding to the Requests would fall on the two small and busy teams running Mr Nolan and Mr Pygram's offices, diverting them and to some extent Mr Pygram himself, from other duties.

45. Mr Kilmartin submitted that responding to the Requests would create a precedent for other unfocussed and wide ranging FOIA requests. Mr Crisp could have narrowed the Requests by identifying the subject matter of interest from publicly available material, such as Mr Nolan's keynote speech about Ofgem's work programme and priorities for 2019 to 2021.

46. Ofgem had been unable to identify through internal enquiries and telephone records any evidence of a call between Mr Crisp and Ofgem staff about narrowing his search.

Mr Crisp's evidence

47. Mr Crisp reiterated that he had offered in a phone call with Ofgem to narrow his Requests, first, from a month to two weeks, and then to three days. At the hearing, Mr Crisp said that he was interested in understanding Ofgem's processes better. Around the time of the Requests, several energy companies were in financial difficulties and it was difficult to find out how the big regulators operated. Mr Crisp denied that the Requests were random or pot luck. The requested information would provide a unique snapshot and interesting insight into the operations of a major regulator and a basis for future investigations.

Ofgem's Submissions

48. Ms Thelen advanced two grounds of appeal. First, that the Commissioner had failed to properly apply the *Dransfield* criteria in assessing vexatiousness, and second,

Ofgem challenged the Commissioner's conclusions about the reasonableness of its assessment of the burden imposed by the Requests.

49. Ms Thelen submitted, with reference to Mr Kilmartin's evidence, that Ofgem's estimates of over 21 hours to respond to each Request were not only reasonable but conservative. Ofgem should not be penalised if its systems appeared slow to the Commissioner.

50. In relation to the *Dransfield* criteria, Ms Thelen submitted that the Tribunal must take into account not only the burden but also the purpose of the Requests. The Requests bore all the hallmarks of a "fishing expedition": a wide-ranging request made in the hope of catching information which might be of interest. Mr Crisp had refused to further narrow or clarify the scope of the Requests despite being invited to do so by Ofgem on five occasions. The Requests satisfied the criteria for a "scattergun" approach, identified as an indicator of vexatiousness in the Guidance. The three days in February 2019 had been selected at random and it would be "pot luck" whether Mr Crisp derived any useful insight from emails received on those days.

51. Ms Thelen submitted that the burden of the Requests was disproportionate when weighed against the lack of purpose. Ms Thelen referred to Decision Notice FS50544833 where in 2014, the Commissioner had upheld on grounds of vexatiousness the Home Office's refusal to disclose metadata for all emails sent and received by the Home Secretary's official account over 7 days.

52. Ms Thelen submitted that it was not necessary for me to make a finding as to whether or not Ofgem had suggested Mr Crisp narrow the Requests to 3 days. I did not hear oral evidence on this issue.

The Commissioner's Submissions

53. For the Commissioner, Mr Mitchell submitted that vexatiousness is a high standard which is not easily reached. It is rare for a request to be inherently vexatious because of the burden imposed on the public authority; this is normally addressed by section 12 FOIA.

54. Ofgem had overestimated the time it would take to deal with the Requests and their approach was unnecessarily convoluted. In particular, their estimate of one minute to retrieve and open each email was excessive. Ofgem had arrived at this figure as an average because opening times for the sample emails varied from 10/15 seconds to 3 minutes. Mr Mitchell submitted that most of the emails were small and very few had attachments (27 out of 201 for Mr Nolan, 38 out of 278 for Mr Pygram). Most could be opened in a few seconds. If, for example, emails with no attachments took only 15 seconds to open and emails with attachments 3 minutes, the total time to open emails would be 124, not 201, minutes for Mr Nolan, and 173, not 278, minutes for Mr Pygram.

55. Mr Mitchell submitted that at the time when the Requests were received, the relevant emails were stored in Outlook, not the slower Sharepoint system. Ofgem had

double counted the time spent in identifying exemptions and then redacting material. Even taking Ofgem's estimates at face value, the burden was not grossly oppressive, whether dealing with the Requests separately as Ofgem had done, or even taking the Requests together.

56. Mr Mitchell submitted that Ofgem had focussed on the wrong issue by focussing on a lack of proper purpose and Mr Crisp's refusal to explain his motivation. The relevant issue was whether there was a reasonable foundation for thinking that the information would be of value to the requester or a section of the public and not the requester's purpose or motive, except where the motive was to harass.

Conclusion

57. In considering whether it is lawful for Ofgem to refuse to provide the requested information under section 14(1) FOIA, I have had regard in particular to the guidance from the Upper Tribunal and the Court of Appeal in *Dransfield* set out at paragraphs 34-37 above.

58. Ofgem took a careful and methodical approach to estimating the time it would take to respond to each Request. I find that Ofgem overestimated the time required to retrieve and open the emails by not taking into account their size, the number with attachments and the fact that at the time of internal review, the emails were held on Outlook and not the slower Sharepoint system. However, Ofgem's estimates for considering exemptions, carrying out redactions and consulting with third parties are low, given the seniority and roles of Mr Nolan and Mr Pygram and the number and complexity of potential exemptions. I find that Ofgem has not "double counted" by allowing time first to consider whether exemptions apply and second, to redact. Redactions will require careful checking, given the sensitivity of information, for example, about ongoing investigations. Third party consultation could be protracted.

59. As Ofgem have overestimated some aspects and underestimated others, I accept their overall figures of 21 hours, 25 minutes to deal with the Request for Mr Nolan's emails and 21 hours 58 minutes for Mr Pygram.

60. However, based on these estimates, I find that the burden imposed by the Requests is not grossly oppressive and does not meet the high hurdle for vexatiousness. This is the case if each Request is considered separately, but also if the Requests are taken together. I note in particular that:

(1) Taken separately, the estimate for each Request is less than the appropriate limit for Ofgem under section 12 FOIA.

(2) While I am not bound by other First-tier Tribunal and Commissioner decisions, I note that the burden here is likely to be less than that on the Home Office in the Commissioner's Decision referred to at paragraph 51 above. That request covered 7 days but related to emails sent, as well as received, and to the email account of one of the most senior Government Ministers.

(3) The combined burden of the Requests of nearly 44 hours does not approach the 31 days found to be vexatious in the *Salford City Council* case (see paragraph 40 above).

61. Dealing with the Requests will impact on Ofgem's operations by diverting staff away from normal duties. However, as Upper Tribunal Judge Wikeley noted in the *Cabinet Office* case, it would undermine the right to information if public authorities were entitled to refuse requests on the basis that they were struggling to meet a large number of obligations with limited resources (at [50]).

62. Turning to the other broad issues identified in *Dransfield*, there is no suggestion here of improper or malicious motive or harassment or distress to staff. There is no evidence of a previous course of dealing.

63. In relation to value or serious purpose, Ofgem contends that the Requests are a "fishing expedition" by Mr Crisp, a random "scattergun" approach which is unlikely to reveal useful information, and which is identified as an indicator of vexatiousness in the Commissioner's Guidance. Ofgem emphasised in particular Mr Crisp's refusal to further narrow or clarify the scope of the Requests.

64. I make no finding as to whether or not Mr Crisp was advised by Ofgem to narrow the Requests to 3 days. However, this is not a case where the requester refused to engage at all with the public body. Like the academic in the *Cabinet Office* case, Mr Crisp did engage, and he did narrow his requests, if not as much as Ofgem would have liked. There was no obligation on Mr Crisp to narrow the Requests further. While underlying rationale and justification are relevant and cannot be "side-stepped" in an assessment of vexatiousness (see para 35 above), Mr Crisp did not have to explain to Ofgem why he wanted the information. Section 14 should not be used as a means of forestalling a genuine attempt, if not to hold Ofgem to account, at least to gain an insight into its inner workings.

65. The Commissioner's Guidance in relation to fishing expeditions is not binding on me. In any event, the Guidance states that a request is not necessarily vexatious if only one or even a number of indicators apply (paragraph 25 of the Guidance). Furthermore, I accept Mr Crisp's evidence that the Requests were not random nor an attempt to "fish" for information in emails sent to Mr Nolan and Mr Pygram. Mr Crisp is a serious investigative journalist and I accept that he had a serious journalistic purpose in making the Requests, namely to obtain a unique snapshot of and insight into the operations of Ofgem. Ofgem is a major regulator whose work to protect energy consumers affects everyone who pays for gas or electricity in the UK. There is a value to the public in understanding how Ofgem works. This is not a case where there is no reasonable foundation for thinking that the information would be of value to Mr Crisp or to the public or a section of the public.

66. The burden imposed by the Requests is not grossly oppressive. The Requests had a serious purpose and there is value in terms of objective public interest in the requested information. Taking into account all the relevant circumstances and the high hurdle for vexatiousness, I therefore conclude that the Requests are not manifestly unjustified and do not involve inappropriate or improper use of a formal procedure.

Ofgem were not entitled to refuse to comply with the Requests under section 14(1) FOIA.

67. The Commissioner agreed that it was incorrect to state at paragraph 34 of the Decision Notice that time for retrieving emails should not be included in estimates when refusing a request under section 14(1). This does not affect my decision which is made based on the findings and reasons set out above.

68. I have not found it necessary in the circumstances to prepare a Closed Annexe for this Decision.

69. In the normal way a draft of this Decision was sent to the Commissioner and to Ofgem to review and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to the Second Respondent and promulgated generally has been edited to correct two errors identified by Ofgem in the draft; namely, in respect of the number of Mr Pygram's emails used in the sampling exercise (paragraph 13) and the appropriate limit for Ofgem under section 12 FOIA (paragraphs 31 and 60(1)).

(Signed)

MS CL GOODMAN **DATE: 22/01/2021**

DISTRICT TRIBUNAL JUDGE