



Response to the Ofgem Re-opener Guidance and Application Requirements Document Modification Consultation

KEY POINTS

- We support Ofgem’s intent to implement the use of a common redactions policy and submission template to bring consistency across reopener submissions – however there are critical changes to be made to current proposals to ensure the policy intent is met and submission process is improved, not hindered.
- To ensure the redactions policy does not lead to harm by failing to properly protect commercially sensitive or confidential information, Ofgem must:
 - **Commit that the most granular level of cost data to be published will be at the ‘cost category’ level**, i.e. the level at which it publishes cost data in its draft and final determinations.
 - The commitment to avoid distorting the market by publishing ‘high-level’ cost data is not clear enough as drafted.
 - This principle should be applied to all reopeners to ensure competition is preserved and commercially sensitive information is not published.
 - **Commit to sharing its proposed redactions ahead of publication with the licensee**, to obtain the licensee’s confirmation before the document is published.
 - Ofgem must allow the licensee to respond regarding the proposed redactions with any changes and associated justification within a prescribed timescale.
 - **Amend its stance on NDAs – where there should be a rebuttable presumption that they constitute sufficient reason for redaction.**
 - The default should be that existence of the NDA is sufficient reason for redaction.
 - Given that NDAs are effectively used to create binding obligations in order to protect commercially sensitive or confidential information, when weighing up the benefits and disbenefits of publication, Ofgem should start from the assumption that (i) any information governed by an NDA may be redacted, and (ii) that if Ofgem were to publish such information it would harm the licensee.
 - **Not assume that information Ofgem obtains from a third party without restriction as to its disclosure does not include confidential or commercial information.**
 - All information for publication should be reviewed against the redactions policy and considered for redaction objectively.
- We also propose various changes to the redactions policy to improve clarity of roles and statutory duties.
- On the submission template for cost data, **it is not helpful that the template does not align neatly to the established electricity distribution cost categories**. This is likely to lead to network operator specific interpretation and inconsistent submissions. We propose greater alignment to our sectors routine RIIO-ED2 RIGs reporting to ensure ease and consistency.

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1. Detailed responses to the questions

1. The rest of this consultation response sets out Northern Powergrid (Northeast) plc's and Northern Powergrid (Yorkshire) plc's responses to Ofgem's detailed questions.

Reopener guidance and application requirements document

Q1. Do you have any views on the proposed revisions to the Re-opener Guidance and Application Requirements Document?

2. No.

Redactions policy revisions

Q2. Do you agree that a more comprehensive Redaction Policy is required purposes explained in section 1 (Introduction) of the proposed Redaction Policy?

3. We agree with the purpose of the proposed Redaction Policy, but some changes are required to the introduction to improve clarity on roles and ensure the purpose fully captures the essence of data protection obligations.
4. In paragraph 1.2, "details" should be deleted from the penultimate line as it serves no purpose. It should also be made clearer that this paragraph is about the Authority: "It provides guidance on how to decide..." should be changed to "It provides guidance on how we will decide...", so that it is clear that "and also comply with our legal obligations" means the Authority's legal obligations.
5. As drafted, paragraph 1.6 does not reflect the various statutory requirements and data protection obligations Ofgem must follow and does not align clearly with paragraph 3.1 which is more comprehensive, stating that Ofgem will comply with other Statutory obligations (Utilities Act 2000, Data Protection Act 2018, Freedom of Information Act 2000, and Ofgem's common law duty of confidentiality and other relevant legislations). "Identifiable individuals" doesn't fully capture the essence of data protection obligations and rights across all of the requirements; for example, The Utilities Act is arguably different because there is an exemption to s105 for the Authority's purposes (s105(3)).
6. We therefore propose adding the following to the first sentence of paragraph 1.6: "*or would otherwise conflict with Data Protection obligations or other Legal or Regulatory requirements as set out in paragraph 3.1 below*".

Q3. Do you have any views on the proposed approach as set out in section 2 (Approach to Redacting Information) of the proposed Redaction Policy?

7. We propose the following changes to section 2 of the proposed Redactions Policy to improve the clarity.
8. In footnote 5 on page 6, "(including the public authority holding it)" should be changed to "(including the *licensee and/or* public authority holding it)" to confirm that the licensee's confidential information is in scope, and "identifies or could reveal the cost data of our assets or activities that we source from third party providers on a competitive basis" should be changed to "identifies or could reveal *tendered unit cost of assets or services that Licensees* source from third party providers on a competitive basis" to be consistent with Annex 2 and to be clear that it is the licensee that carries out the tender, not the Authority.

9. In paragraph 2.5, it says “we will follow the approach outlined below”. The relevant paragraph reference should be added so it is clear what “below” means.
10. “Numbered paragraph” should be deleted from paragraph 2.6 as it serves no purpose and “the policy” should be changed to “*this* policy” in the third line.

Q4. Do you agree with the three proposed redactable information categories? Are there any other categories that should be considered?

11. We agree with the three proposed categories.

Q5. Do you have any views on the redactable information category explanations set out in Annexes 1, 2, and 3?

12. On Annex 1 (Confidential Information), we propose the following changes to the explanation of confidential information in the first paragraph.
 - a. The words “(all as amended from time to time)” should be inserted after the “the Energy Act 2004”.
 - b. The words “or a Licensee” should be inserted after “...or information which Ofgem”, so that it’s clear that the Licensee can also assess whether the disclosure of information may significantly harm the legitimate business interests of the undertaking to which it relates – as opposed to this being determined solely by Ofgem.
 - c. The words “if disclosed” should be inserted after the words “...the undertaking to which it relates”.
 - d. The explanation refers to “Intellectual Property Rights” but there is no definition of this in the document. We would propose this is defined in the policy for clarity.
13. In paragraph 2 of Annex 1 (Confidential Information), the drafting states that “Confidential Information shall not include information which [...] is received from a third party (who lawfully acquired it) without restriction as to its disclosure”. It is possible for information that meets this criteria to include confidential or commercially sensitive information that would cause harm to the licensee, other companies or individuals, so it should still be reviewed and considered for redaction objectively. We would suggest dropping this from the exclusions list.
14. On Annex 2 (Commercially Sensitive Information), we agree with Ofgem’s intent to avoid distorting the market by publishing high-level cost data, but Ofgem should be clearer and firmer on the process it will apply to ensure competition is preserved. The example Ofgem gives in the draft policy, “e.g. publish aggregated cost estimates, instead of exact unit cost data; or production or consultancy costs in form of the total project value”, will lead to the release of commercially sensitive information if it does not come with the commitment that the most granular level of cost data to be published will be at the ‘cost category’ level, i.e. the level at which it publishes cost data in its draft and final determinations. This principle should be applied to all reopeners.
15. And on Annex 3 (National Security), we propose several grammatical changes below.
 - a. In paragraph 1 of Annex 3, “a” should be inserted before “possible” in the fourth line and “the” should be inserted before “actual” in the fifth line.
 - b. In paragraph 2 of Annex 3, “a” should be inserted before “risk” in the eighth line.

- c. In paragraph 3 of Annex 3, “the” should be inserted before “Tribunal”, “an” should be inserted before “ever” and “a” should be inserted before “wide”.

Q6. Do you agree that the existence of a Non-Disclosure Agreement (NDA) should, in itself, not be sufficient reason for redaction or non-compliance with the policy (as explained in Annex 2)?

16. We do not agree. The default should be that existence of the NDA is sufficient reason for redaction or non-compliance with the policy.
17. Given that NDAs are effectively used to create binding obligations in order to protect commercially sensitive or confidential information, when weighing up the benefits and disbenefits of publication, Ofgem should start from the assumption that (i) any information governed by an NDA may be redacted, and (ii) that if Ofgem were to publish such information, it would harm the licensee.
18. We therefore propose the following changes to the first paragraph of the NDA sub-section:
 - a. ~~“NDAs are a matter for licensees themselves, and on their own are not sufficient reason for redaction or non-compliance with this policy. Where information is covered by an NDA to which the licensee is a party, then the licensee must provide confirmation that the information governed by the NDA is Confidential Information, Commercially Sensitive Information, or National Security information, and that publishing it may harm the licensee. sufficient justification as to why non disclosure would be in the consumer interest”.~~
19. Also, the NDA section heading in Annex 2 includes legally privileged information, but the text of that section does not mention legally privileged information. The section should, therefore, include confirmation that any information that is legally privileged can be redacted.

Q7. In your view, is the proposed scope of the redaction policy correct? Should it apply to all re-openers or should some mechanisms be excluded from scope?

20. We agree with the scope. Reopeners that are excluded from the requirement to publish the submission on the company website (e.g. cyber and physical security reopeners) can also be excluded from the scope of this policy, and those submission documents will not be shared beyond the company and Ofgem.

Q8. Do you agree with the process as set out in Section 4 (Process for Publications) for (a) Ofgem’s publications, and (b) licensee’s publications?

21. We do not agree with paragraph 4.1(c), where in its publication process “Ofgem may share draft versions of the documents with licensees to elicit their views on the proposed redactions”.
22. Before Ofgem publishes any documents that includes its proposed redactions, Ofgem should share draft versions of the relevant documents with the licensee, to obtain the licensee’s approval before the document is published and allow the licensee to respond to Ofgem regarding the proposed redactions with any changes and associated justification within a prescribed timescale. And if the licensee fails to respond, Ofgem would then be free to publish.
23. We therefore propose that paragraph 4.1(c) is changed to “Ofgem *will* share draft versions of the relevant documents with the licensee for approval and comment within [a reasonable time period]. The licensee must provide justification for any proposed changes to the redactions, and if the licensee fails to respond within the predetermined time period, Ofgem is free to publish.”
24. We also propose some changes to the drafting of section 4 (Process for Publications) below.

- a. In paragraph 4.1(b), “publications” should be changed to “*publication*” and “may” should be changed to “*will*”.
- b. In paragraph 4.1(d), “*the*” should be inserted before “redacted” and “un-redacted” and “document” should be changed to “*documents*”.
- c. In paragraph 4.2(c), “with the policy” should be changed to “*within* this policy”.
- d. In paragraph 4.2(e), “documents” should be changed to “*document*” and “as well as explanation the nature” should be changed to “as well as *an* explanation of the nature”.

Q9. Do you have any views on the General Consideration set out in section 5 (General Considerations)?

25. We have two proposed changes to section 5 (General Considerations):

- a. In paragraph 5.2(a), “or the person for the time being carrying on the business” should be changed to “a person duly authorised by the business”.
- b. In paragraph 5.4, “pose risk to security” should be changed to “pose *a* risk to security” and “documents” should be changed to “*document*” in the fourth line.

Reopener submission template and associated instructions document

Q10. Please provide your views on the split between direct and indirect costs on each of the 2_Costs_Section worksheets.

26. We think this is a helpful segregation costs for understanding the nature of the costs requested.

Q11. Please provide your views on the split between Company Costs and Contractor Costs on each of the 2_Costs_Section worksheets.

27. The definition for ‘Contractor’ costs needs to be clearly set out to ensure consistent application. If this intended to be consistent with the definition of the ‘Contractor’ cost type as stated in RIIO-ED2 Reporting Instruction Guidance (RIGs), Ofgem should clarify whether it is also looking to understand the level of ‘Material’ costs that do not form part of ‘Contractor’ costs.

Q12. In your view is specific instruction required for any of the individual worksheets? Please provide as much detail as possible on what is required. We also welcome suggested draft text.

28. It is not helpful that the template worksheet and table categories do not align neatly to the established electricity distribution cost categories. This is likely to lead to distribution network operator specific interpretation and inconsistent submissions.

29. For electricity distribution, we would prefer that the tables are specific to our sector and that we are able to be prepare reopener submissions in accordance with RIIO-ED2 RIGs to ensure ease and consistency.

Q13. Do you have any views on the overall structure and design of the Re-opener Submission Template?

30. As per our response to Q12, greater alignment to our sectors routine RIIO-ED2 RIGs reporting would be welcomed.

Q14. Do you have any views on the scope and content of the Re-opener Submission Template?

31. As per our response to Q12, the template would be more useful to our sector if it was aligned to the established electricity distribution cost categories.

32. Also, the CBA templates are relatively simple and we would question whether they provide Ofgem with the comprehensive information required to assess CBAs. The CBA templates are more akin to an optioneering template – which may be the level of detail Ofgem intends to receive.