THE RENEWABLE HEAT INCENTIVE INQUIRY

SUPPLEMENTARY

CLOSING STATEMENT

ON BEHALF OF OFGEM

Contents

- **III. Peter Rice**

[Abbreviations adopted are as set out in Annex 1. Where text is highlighted this has been added to snapshots from documents disclosed by the Inquiry and is not original highlighting, unless otherwise stated. Brackets following transcript references are to the line of the relevant page of the transcript.]

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Introduction

1. These supplementary closing submissions are made on behalf of Ofgem. The submissions address matters raised before and by the Panel during the course of Day [112] of the Inquiry's oral hearings, when closing submissions were received from Ofgem, the DfE and DOF. They also address matters arising from investigatory work of the Inquiry which was ongoing at the conclusion of the oral hearings.

2. The submissions address the following matters:

   (i) **Stephen Brimstone's application for accreditation under the Scheme**

   (ii) **Role of the Accounting Officer**

   (iii) **Peter Rice**

3. Ofgem is grateful for the opportunity afforded to it to address these matters further.

I. Stephen Brimstone's application for accreditation under the Scheme

4. The Inquiry has focussed on Ofgem's handling of Stephen Brimstone's application for accreditation. Observations were provided on behalf of Ofgem in its first Written Closing. These are highlighted below for convenience.

5. The question of mixed-use or domestic / non-domestic cases (of which Mr. Brimstone's application is such a case) is addressed at paragraphs 320 to 324 of Ofgem's closing written submission, which can be found at SUB-01091 through to SUB-01093. Reference is also made back to Ofgem's letter of 4 October 2018 [OFG 136400 to OFG-136407]. Further, the closing submission goes on to address matters relating to Mr. Brimstone's application in particular at paragraphs 467 to 473 [SUB-01128 to SUB-01129]. The Inquiry is requested to re-read those submissions before turning to the supplementary submissions below.

6. At the time of making those closing submissions, the Inquiry's investigatory work was ongoing. Mr. Aiken (CTI) summarised the Inquiry's work to examine Ofgem's handling of this case, including highlighting matters from the [12] witness statements that had been sought by the Inquiry from September 2018 onwards [see TRA-16798 onwards].

7. Ofgem's submissions on this issue are as follows:

   (i) It is unsafe to treat this case as a "test case" for Ofgem's handling of applications generally or in relation to specific categories of applications;

   (ii) In relation to the sharing of information with the DfE, Ofgem has accepted that information sharing could have been better, and this extends to the case of Mr. Brimstone;

(iii) The relevance of LPS enquiries are nuanced and depend on the precise case in hand; and

(iv) Although things could have been done better in relation to sharing information with the PSNI in this case, there is no case for a wider concern about Ofgem's approach to sharing information with the Police or to Data Protection legislation.

8. For completeness, Ofgem conducted an investigation into Mr. Brimstone's accredited application in light of information provided by the LPS. This investigation concluded on 8 February 2019 and Mr. Brimstone's accreditation to the Scheme has been revoked with effect from 7 November 2018. The revocation decision was based on a change of factual circumstances triggered by the change in the rateable status of the outbuilding, which meant Mr. Brimstone could no longer comply with the Scheme eligibility requirements and his ongoing obligations. In November 2018 the LPS reclassified the outbuilding from an agricultural building for Domestic rates banding purposes to a domestic store which is treated, for Domestic rates purposes, as part of single domestic premises with the associated dwelling-house forming the remainder of those premises. Ofgem had previously assessed the outbuilding as separate non-domestic premises; but in light of the reclassification assessed whether the installation was generating heat solely for the use of single domestic premises within the meaning of the 'excluded plant' provisions in regulations 15(1)(a) and (2). Following the LPS decision, Ofgem regards the outbuilding and main residential property as ineligible single domestic premises.

(i) It is unsafe to treat this case a test case for Ofgem's handling of applications generally or in relation to specific categories of applications

9. In introducing his submissions on Day [112], CTI indicated that Mr. Brimstone's application might be "something of a test case" [TRA-16800].

10. CTI indicated that the issues requiring examination were how Ofgem handled allegations of fraud that it received, how it conducted the audit process for which it was responsible and related decision-making about scheme eligibility [see TRA-16799 to TRA-16800]. Further it was noted that the issues that arise in his installation do not just relate to Mr. Brimstone; other PWC "category 4" cases also involve mixed domestic / non-domestic usage, like Mr. Brimstone's [see TRA-16845].

11. Ofgem has rightly acknowledged that its handling of Mr. Brimstone's case is a matter of significant public importance. This is because of Mr. Brimstone's status (at the relevant time) as a Special Adviser and the publicity surrounding allegations of fraud against him. Ofgem therefore acknowledges the importance of the Inquiry examining Ofgem's

handling of the case closely. Further, Ofgem accepts that issues of the type raised by Mr. Brimstone's case also arise in relation to other applications for accreditation under the Scheme.

12. However, any findings made by the Inquiry in relation to Mr. Brimstone's application cannot be safely or rationally translated to findings in relation to other cases generally or in relation to cases of a specific category; for the two reasons given below, any finding in relation to Ofgem's handling of Mr. Brimstone's application relates to that case only.

13. At the outset and before providing those reasons, it is appropriate to reflect that any consideration of this case should be seen in its context for the Scheme as a whole. Our analysis indicates that 107 applications have either been revoked or refused accreditation (including both full and preliminary applications for accreditation); and that 37, or c. 30%, of those were revoked or refused accreditation on the basis of minimal non-domestic use. And only 2 of those involved PSNI.

14. The first reason then, is that Mr. Brimstone's case was chosen for further investigation by the Inquiry because of its importance. Although CTI has stated that "the Inquiry intended to look at the Ofgem Brimstone investigation as something of a test case" [TRA-16800], it is far from a true "test case" in the sense of being representative of all 2162 applications for accreditation, mixed-use cases or any other category of cases. To the contrary, it is a special case because of political sensitivity coupled with media speculation about the Scheme: see the evidence from Ofgem summarised by CTI at [TRA-16802 to TRA-16804]. A single case, particularly one selected because of its particular importance or sensitivity, and which a number of external bodies (including the PSNI and LPS) have been involved in (and adopted different positions over time), is not a good marker for the approach taken by Ofgem generally in relation to compliance. Further, it is plainly not a statistically significant sample of any of these specific populations of cases.

15. It is, of course, open to the Inquiry to make a specific finding in relation to this case beyond those which have been the subject of relevant concessions by Ofgem. And it is acknowledged above that issues of the type raised by Mr. Brimstone's case may arise in other cases. It would however be unsound to extrapolate, without further examination of other cases and relevant evidence, from a finding in relation to only Mr. Brimstone's case, to make a finding in relation to Ofgem's administration of the Scheme generally.

16. This applies in relation to any matter examined in the course of the Inquiry's investigation into Mr. Brimstone's application.

17. The second reason, closely related to what is said above, is that Ofgem's letter of 4 October 2018 makes clear that in relation to the specific question of accreditation, mixed use cases each need to be assessed on their own facts. See, for example, paragraph 12 of that letter which refers to the acceptance by PH of the Department that mixed use cases need to be assessed on their own merits [OFG-126645].

18. The summarising, by CTI, of the evidence of Sarah Cox (SCx) [WIT-282320] refers to the broader category of mixed-use cases [see TRA-16845]. SCx noted that ultimately, she considered that the right outcome had been reached on the basis of the legislation when it was decided not to revoke Mr. Brimstone's accreditation in July - August 2017. CTI then stated:

> *Now, we've been concentrating on Mr Brimstone's application and his installation. Obviously, the issues that arise in his installation don't just relate to Mr Brimstone. There were many category 4 cases that PwC audited that touched on this question of mixed use or domestic/non-domestic, and, in fact, PwC did not audit Mr Brimstone's installation, so it was a series of other domestic/non-domestic properties that were examined.*

19. CTI then referred to other cases that Ofgem had considered relating to mixed-use [see TRA-16846 to TRA-16847]. The suggestion appears to be that the Inquiry could make findings generally about Ofgem's approach to, and handling of, mixed use cases generally from these matters.

20. For the reasons outlined above at paragraph [14] onwards it is unsafe to follow such an approach based on written evidence about one case only but particularly so in the case of mixed use cases which must be considered on their own facts.

21. We respectfully submit that if the Inquiry does seek to extrapolate Mr. Brimstone's case, to find that this case does not stand alone in Ofgem's general approach to, and handling of, mixed use cases, then the underlying facts of those PwC cases must first be examined rather than treat the PwC material and findings as the last word. To illustrate this point, annex 2 to these submissions is a list of the PwC "category 4" cases, in which PwC identified heat use in domestic premises. Those cases were investigated by Ofgem following the PwC work. Although none of them involved revocation of accreditation, one [redacted] involved accreditation being refused and in others decisions on accreditation are pending. Relevant examples from these cases include:

(i) [redacted]. PwC identified that the installation was providing heat to 4 domestic premises but that there was no evidence of each of those premises being subject to domestic rates. As such, PwC identified a concern that the installation

was heating single domestic premises. Subsequent investigation by Ofgem indicated that the 4 domestic premises were multiple domestic premises that were part of an ongoing holiday cottage business. The evidence submitted to Ofgem included individual rates bills.

(ii) Irrelevant information redacted by RHI Inquiry. PwC identified that the installation was providing the majority of its heat to a single domestic dwelling. Subsequent investigation by Ofgem established that heat was also being provided to offices in a converted stable block.

(iii) Irrelevant information redacted by RHI Inquiry. PwC identified that the installation was predominantly domestic. Subsequent investigation by Ofgem established that heat use was also taking place in a furniture workshop. Evidence of rating status was submitted in the course of Ofgem's investigation which satisfied Ofgem in relation to non-domestic heat use.

(iv) Irrelevant information redacted by RHI Inquiry. PwC identified that the installation was predominantly heating single domestic premises. Subsequent investigation by Ofgem established that the installation was also being used to dry woodchip, which was being used in significant quantities as animal bedding in a farm business conducted by the participant.

22. As the above examples indicate, in practice a considerable range of circumstances may be encountered that can materially affect the application of the "single domestic premises" exclusion. Reference to Mr. Brimstone's case would not assist with analysing or predicting how those circumstances should correctly be addressed under the regulations.

23. Finally, in response to the query posed by the Chairman [at TRA-16847], it appears that there was no specific consideration of regulation 33(p) in the context of Mr. Brimstone's case. Ofgem does not consider this regulation is applicable to these cases, as discussed further in the advice of Leading Counsel (Sam Grodzinski QC) dated November 2018 [OFG-217597 to OFG-217602].

(ii) Sharing of information with the DfE

24. From TRA-16827 onwards CTI highlighted the issue of sharing of information about the audits and counter fraud consideration of Mr. Brimstone's case with the DfE.

25. As the Inquiry will be aware, Ofgem has made various concessions about the sharing of information with the Department. For example, in DN's second statement, Ofgem accepted that there were "*shortcomings in relation to the communications between it and the Department*" and there was a "*failure to share optimal levels of information*": Ofgem accepts the

level of information sharing could have been better [see WIT-95218; WIT-95269-71; and SUB-01004 and SUB-01140]. Further, in relation to sharing information about audits, Ofgem accepts that prior to 2015 it did not routinely share the results of audit findings, and that audit reports were not provided to the Department until 2016 [see WIT-95319; EW at WIT-114147; and SUB-01126]. Ofgem repeats those concessions in relation to the sharing of information on some arguably perverse outcomes of the Scheme, of which the Brimstone case is an example.

(iii) Relevance of LPS enquiries

26. Ofgem witnesses have given evidence on whether enquiries were made to the LPS (similar to those made by the PSNI to the LPS, NI Water and DAERA) about the declared domestic / non-domestic status of Mr. Brimstone's property. For example, EW noted such enquiries were not in standard procedures [WIT-280718]; Further, ST understood that this information would have been requested from the LPS, as part of the initial RHI application checks conducted by the RHI Operations / Compliance team, unless alternative evidence meant it was not necessary to request information on rates [TRA-16808 (13-18)]; ST#2 [WIT-284737, para. 12(a)]. As explained more fully below, Ofgem respectfully submits that the assessments of alternative evidence, and the enquiries of respective valuation rolls, that its accreditation processes provide for mean that direct enquiries of the LPS are not necessary, as noted by ST.

27. EW, and Patricia Dreghorn [at WIT-284520], correctly noted that enquiries of the LPS, <u>of the type made by the PSNI</u>, are not included in Ofgem's accreditation process / standard operating procedures (SOPs). However, basic enquiries of online services are utilised in Ofgem's pre-accreditation processes to assess the rateable status of premises in appropriate cases. Ofgem has disclosed details of the processes and resources used by it in this respect (see for example [WIT-103313], [WIT-103318 – WIT-103320], [OFG-18683 to OFG-18692], [OFG-163547 to OFG-163554]). Further disclosure is provided with these submissions as [OFGEM 148041740, and OFGEM 148041767 - OFGEM 148041779]. Those processes and resources make reference to further processes and resources, and to provide as comprehensive a picture as possible those are disclosed with this statement. In some cases, however, the applicant does not (or is unable to) supply business rates bill(s) or documentation at the point of application. In those cases an alternative assessment process is conducted to assess the possible non-domestic status.

28. This alternative assessment process is, it is submitted, appropriate because some businesses with premises that have not been rated, or applicants subject to a legal exemption from non-domestic rates liability (e.g. many agricultural buildings and farms are exempt from paying

business rates), may not be able to provide business rates bills / documentation. As such the installation property address is not checked against the online valuation rolls and Ofgem conducts an assessment of the nature of the space / premise to which the installation provides heat, and the heat use, by means of the non-domestic questionnaire (NDQ) and supporting photographic evidence. Mr. Brimstone's application was subject to this alternative pre-accreditation assessment – his application and responses to Ofgem's NDQ, provided during the pre-accreditation checks, are available at [OFG-73850; OFG-73778; OFG-73786-92; OFG-73797-8]].

29. CTI implicitly raised the issue of whether an approach which did not always check against online valuation rolls was consistent with Ofgem's Guidance [INQ-30050], which refers to rating status at 4.42-4.46. This approach is wholly consistent with the Guidance, which explains at 4.43-4.44 that properties which are domestic rated will be assessed in a particular way by Ofgem, but, explains at 4.45 that certain premises are exempt from rates (such that, logically, the approach of relying on rateable status would not, therefore, apply).

30. Ofgem accepts that, where appropriate, it can take a different approach and make additional enquiries of the LPS [and other third-parties]; for example as part of further investigative processes as Ofgem did in 2018 in relation to Mr. Brimstone's case. As noted by SCx, in deciding to take this approach Ofgem should first have regard to the costs, benefits and considerations of that course of action as set out in paragraph 52 of SCx's witness statement [WIT-282323/4].

31. However, Ofgem' considers the standard pre-accreditation processes (the online valuation enquiries and the alternate space / premise and heat use assessments) as set out in the review checklists, SOPs, internal guidance material are appropriate and proportionate. To conduct enquiries of the LPS, such as those made by the PSNI, as part of the standard pre-accreditation process would be unnecessarily burdensome. Ofgem therefore does not consider it necessary to include direct enquiries of the LPS within its standard procedures.

32. Ofgem's position is that Mr. Brimstone's application is not representative of the different assessments undertaken in Ofgem's standard pre-accreditation procedures, as noted above in paragraph [27]. Further, the additional enquiries made of the LPS by Ofgem in 2018 means Mr. Brimstone's application is more of a "special case" and therefore should not be used as a "test-case". Ofgem respectfully submits that findings made by the Inquiry in relation to Mr. Brimstone's application cannot be applied more generally about Ofgem's approach to assessing the non-domestic status of applications for accreditation.

(iv) Sharing information with the PSNI in this case and Ofgem's approach to sharing information and Data Protection legislation.

Issues arising

33. The Inquiry has examined the chronology of events relating to the handling of requests received by Ofgem that it should share information with the PSNI. The summarising of this begins at TRA-16814. We understand that the Panel is likely to have the following questions arising from this summary and its previous consideration of the matter with DN on Day [109] of the Inquiry's oral hearings:

    a. Whether there was a wider / cultural problem with Ofgem sharing information with police services?

    b. What is the nature of the legal assessment which Ofgem is required to undertake in order to decide whether to disclose information to a police service?

    c. Was it necessary for the PSNI to complete a particular form under the DPA98 in order to lawfully request information from Ofgem?

    d. Would it have been possible for Ofgem to provide an indication of the number / amount of information it had, so as to avoid some "sort of guessing-game activity for law enforcement agencies trying to prevent or detect criminal activity"?

    e. What, if any, relevance to this assessment was the PSNI and Ofgem deciding it was not investigating?

    f. What measures does Ofgem have in place to ensure, on an ongoing basis, compliance with data protection legislation while also ensuring that the wider public interest is served?

    g. What is Ofgem's current approach to data sharing?

34. We provide further relevant information to assist the Inquiry in relation to its understanding of these matters below.

(a) Difficulties encountered in relation to sharing information with the PSNI in this case are not proof of wider or cultural problems either with Ofgem's approach to sharing information or Data Protection legislation

35. There are six main reasons why this is the case:

36. First, the reasons outlined at paragraph [14] onwards apply equally to this issue: it is unsafe to reach a general conclusion based solely on the examination of one case.

37. Second, the evidence which the Inquiry has received points in the opposite direction. The evidence of all Ofgem witnesses, at all levels of seniority about Ofgem's approach to sharing information with the police services, points to a willingness and desire to share information with PSNI and other police services to assist with their enquiries.

38. For example, as Ofgem's Chief Executive, DN, stated during his oral evidence [TRA-16469 onwards], in Ofgem's role it is necessary for it to share information with a range of bodies. This includes other regulators and police services in GB and NI (and elsewhere). Ofgem has made a number of references to the police services in both GB and NI [see TRA-16470 (2-3) and paragraph [41] below]; and in the 2018-2019 financial

year has responded to 43 information requests received from police services / law enforcement bodies.

39. Ofgem's position is that it is clearly in the public interest for information to be shared between public authorities. Any such disclosure however needs to be in accordance with the relevant legal framework and the staff responsible for taking decisions on disclosure need to have regard to this, including by taking appropriate legal advice. This would need to take account of the specifics of the case, including the information concerned and in the case of disclosures to other investigating authorities such as the police, the status of any investigation.

40. Further, JJ, the Ofgem lawyer whose advice the Inquiry has considered extensively, makes a very similar comment in his evidence. JJ was asked whether, at the time of considering the PSNI requests, there was a "culture within Ofgem not one of complete openness and transparency with police fraud investigations." His response to this was "there was complete openness and transparency with police fraud investigations, subject to the statutory limitations that were in place at the time" [WIT-286021].

41. It is therefore clear that there is no wider / cultural problem with Ofgem sharing information with police services (as submitted at paragraph 471 of Ofgem's written closing [SUB-01129]); the culture is one where Ofgem staff want to assist subject to complying with important legal considerations. The views held by Ofgem officials are reflected in practice. Since 2015 (which is when records readily accessible to Ofgem commenced) Ofgem has referred 62 cases to law enforcement bodies in connection with the schemes and environmental programmes administered by E-Serve with the exception of the Energy Company Obligation (ECO). (ECO involved a further 59 referrals, some of which were initiated by Ofgem and some by energy supply licence holders – the statistics held by Ofgem do not distinguish between the categories of cases).

42. Third, any problems identified by the Inquiry in this regard are not causative of any of the wider issues relating to the Scheme and are confined to the specific facts of the case.

43. Ofgem has set out clearly, in its written and oral closing submissions the matters which it says are causative of what went wrong in relation to the Scheme [see TRA-16855 onwards]. Sharing of information with the police services are not among those. This can be explained by the wide (and permissive) drafting of relevant aspects of the Regulations which have allowed persons to be accredited in a wide range of circumstances short of committing fraud.

44. Fourth, it is relevant to consider that the specific circumstances in which Ofgem was considering sharing information with the police were relatively unusual. In some cases Ofgem is called upon to share information with police services following or as a consequence of referrals made by it to those police services where (i) a person is not eligible for some benefit arising under the Scheme and (ii), flowing from this, that person is suspected by Ofgem to have committed fraud in order to seek to demonstrate that eligibility. This was not the case in relation to Mr. Brimstone.

45. In Mr. Brimstone's case, Ofgem had in fact determined, at the time it was asked for information by PSNI, that Mr. Brimstone was entitled under the Scheme. That determination had been followed by a site inspection and audit investigation. Ofgem's position is that a determination by it that a person is not entitled under the Scheme is a necessary but not sufficient condition for a successful fraud prosecution. In light of this, Ofgem had not previously determined that it had grounds to make a referral to the police service prior to being asked to provide information to the PSNI. In fact, the opposite applied – Ofgem had specifically satisfied itself that no basis for such a referral arose.

46. Fifth, Ofgem notes that there is no evidence of other cases in relation to the Scheme where there have been actual or perceived problems in relation to the sharing of information with the PSNI. Therefore, Ofgem observes that any findings relating to the Mr. Brimstone case are of limited application: to this case alone.

47. Sixth, Ofgem has sought advice from Leading Counsel on the lawful approach to adopt in relation to information sharing with police services and other bodies. Such advice is that the approach adopted by Ofgem, including an assessment of the justification for sharing information, is required of Ofgem under data protection law. Further detail as to this Opinion is set out below.

(b) The legal assessment that Ofgem is required to carry out when sharing information with police services

48. Following the coming into force of the Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA18) in May 2018, Ofgem's legal team sought advice from Leading Counsel (Samantha Leek QC) on matters relevant to the sharing of information with the police [the instructions and Opinion now produced to the Inquiry as disclosure references "OFGEM 148041737" and "OFGEM 148041738"] in order to test its approach in relation to the disclosure of information to police services. This Opinion was requested to inform future cases by understanding how the introduction of the GDPR and DPA18 would affect Ofgem's approach. This Opinion was sought in July 2018, in advance of the Inquiry's raising issues relevant to the sharing of information

with police services, by way of the September 2018 requests for witness statements concerning Mr. Brimstone. The Opinion also addresses the approach required by the (now repealed) Data Protection Act 1998 (DPA98) which was in force at the relevant time in relation to the request made by the PSNI in Mr. Brimstone's case.

49. As is summarised more fully below, to achieve compliance with the GDPR and DPA18, Ofgem must do more than simply "rubber stamp" information requests received from police services (at [22]): Ofgem must first analyse and consider the request.

50. Paragraphs 1 to 47 of the Opinion are those most likely to be relevant to the Inquiry's understanding of matters relevant to those considered at TRA-16819. These paragraphs advise in relation to the approach that had been taken by Ofgem to sharing information with police services under the previous DPA98 regime. The remainder of the Opinion addresses considerations relevant to how that approach needed to be changed in order to reflect the GDPR and DPA18 regime.

51. For completeness we note that "Request A" referred to in the Opinion is one of the requests, dated 20 November 2017, received from the PSNI in relation to Mr. Brimstone's case.

52. The passages which the Inquiry may wish to consider, and which explain relevant aspects of the legal assessment Ofgem must make when assessing information sharing with police services, are as follows:

53. Paragraphs 11, and 18 to 29 explain how Ofgem must analyse and consider requests for information from police services. In Mr. Brimstone's case, JJ's advice dated 27 October 2016 was consistent with this approach ([OFG-210235]). The presence of an ongoing suspicion of dishonesty on Ofgem's part and / or, of an ongoing investigation by a police service, is identified as vital to Ofgem's assessments in this respect ([19], [21 to 24], [26 – 27]) This consideration is reflected in Ofgem's decision that, in the absence of suspicions on its part of dishonesty by Mr. Brimstone [OFG-128558], and in the absence of an ongoing police investigation, the PSNI further request for information made on 1 November 2016 [OFG-128555] was in effect superseded with no further action being required. As Samantha Turnbull (ST) [WIT-284721 to 284723] explains in her statement: "*I assume that I thought that the later email [from PSNI] superseded the request for the audit report sent earlier that day, that the police were no longer looking for a copy of the audit report and was asking John Jackson to let me know if he had concerns (i.e. if he disagreed that the email from* PSNI DC personal inform *concluded matters). John's email in response appears to confirm that he also considered that this concluded matters i.e. the audit report was no longer being sought*."

54. Paragraphs 12-17 explain the interaction between a "full" DPA analysis and the abridged assessment required where information sharing that would not otherwise be consistent with the DPA is assessed under the exemption provided for in section 29 DPA98. JJ's initial 27 October 2016 advice reflected this approach.

55. Paragraphs 28-30 explain matters relevant to the assessment where Ofgem concludes upon considering a request from a police service that there has been no criminal conduct by a participant seeking benefits under the Scheme. As mentioned above this was the case with Mr. Brimstone's application, and JJ's advice of October 2016 is consistent with the careful approach that is suggested by the Opinion in this respect.

56. Paragraphs 31-40 where Leading Counsel provides an overview of the assessment required under section 29(3) DPA98. This explains that it is necessary for a data controller to carry out a case by case assessment of necessity and prejudice as required arising out of relevant case law. Further, the ICO's three-step approach to the issue of prejudice outlined in its guidance is explained.

57. Paragraphs 45-47 consider factors that are relevant to Ofgem requesting information from police services in order to inform its assessment of their requests for information.

(c) Was it necessary for the PSNI to complete a particular form under the DPA98 in order to request information from Ofgem?

58. No. But as noted in the Opinion from Leading Counsel outlined above, it is recommended (in line with the approach outlined by the ICO in guidance) as good practice.

(d) Would it have been possible for Ofgem to have outlined to the PSNI the categories or descriptions of information held by it in relation to Mr. Brimstone?

59. The approach Ofgem adopted in Mr. Brimstone's case did not require the PSNI to engage in a "guessing-game" about the material held by Ofgem. JJ, after reflection, suggested to ST that it would be acceptable for Ofgem to communicate to PSNI that an investigation had been concluded by Ofgem and envisaged that this could then have led to further information requests [OFG-210231]. ST duly gave that indication [OFG-128500] and received in turn the further 1 November 2016 information request referenced above. It was therefore clear to PSNI at the relevant time that Ofgem had in fact commissioned an audit report.

(e) The relevance of Ofgem and PSNI not investigating Mr. Brimstone to the assessment of the data sharing issue

60. This is addressed above, by reference to the Opinion received by Leading Counsel in relation to data sharing. Before Ofgem's audit report had been provided to PSNI in accordance with its 1 November 2016 request, PSNI indicated it considered on the basis of the application material that there was no cause for concern. There was further communication between Ofgem and PSNI [OFG-130019] after Ofgem decided not to provide the audit report. This was acknowledged by PSNI in early 2017 [OFG-130018] when the PSNI noted that everything was closed off but since the issue had "hit the headlines" in Northern Ireland there may be more to come to light – and, that if that was the case then the PSNI would be in contact with Ofgem.

61. As noted above, the fact that Ofgem officials understood that the PSNI was no longer investigating, was relevant to the assessment Ofgem needed to undertake to inform its compliance with the DPA98.

(f) Measures Ofgem has in place to ensure that, on an ongoing basis, the wider public interest is served whilst remaining compliant with data protection legislation

62. At the outset of this subsection of submissions it is appropriate to reflect on what JJ says in his first witness statement about the grounds under section 29(3) DPA98 under which the material was requested. This was in response to a question from the Inquiry about whether it was Ofgem's role to assess the veracity of a police fraud investigation [WIT-286024]. In his response JJ refers to the PSNI's request of 25 October 2016 [OFG-44935-OFG-44936].

63. JJ's first and second statements should be read alongside this document. JJ's reference in his first statement to the "miscellaneous" section of the explanatory notes to the form appears to have been by way of commentary on the potential application of the section 29(3) DPA 1998 "non-disclosure" provisions and / or the use of the form by PSNI. He accepts that PSNI did not appear to have been relying on grounds relating to risk of injury in seeking the disclosure of information. In any event we note that:

(i) this does not appear to be causative of any difference of approach in terms of sharing information with the police at the relevant time. As mentioned in paragraph 54 above, JJ's advice and approach to the PSNI request at the time it was made and actioned was by reference to the "full" DPA98 analysis and not by reference to the section 29(3) provisions. Further,

(ii) Ofgem's general position – for the reasons outlined in Leading Counsel's advice – is that it is correct for Ofgem to scrutinise requests from the police, as with any body, to ensure compliance with the relevant data protection legislation.

64. As DN acknowledged in his evidence to the extent that there was one, any misunderstanding was regrettable [TRA-16469]. It is relevant in this regard to consider what is said above about the awareness the PSNI had about relevant matters. In any event, Ofgem took subsequent steps to ensure that the PSNI were able – following Ofgem's own reconsideration of the case, including through the Deloitte review [OFG-200494 – OFG-200516] – to revisit the matter as they considered appropriate; as noted in SCx's witness statement at paragraphs 44 and 45 [WIT-282321]:

65. SCx considered: *"…that the team provided the information they thought they were required and able to provide (taking into account matters such as the legal framework under the Data Protection Act) at the time of the request in October 2016."* And having reconsidered the case, post the May 2017 Deloitte report it was *"appropriate to share additional information with the PSNI so that they could revisit the matter as they considered appropriate".* SCx was not therefore suggesting that the 2016 decision was wrong when it was taken and needed to be rectified but, rather, that by July 2017, following the Deloitte review, Ofgem had reconsidered the position and taken a different view that resulted in further information [audit reports] being provided to the PSNI by means of voluntary disclosure [as supposed by CTI [at TRA-16825 to TRA-16826]. ST contacted the PSNI on 24 July 2017, to inform them of the Ricardo audit reports and ask if it would they wanted sight of them; and subsequently shared the reports with the PSNI on 28 July 2017 [see email exchanges between ST and the PSNI at OFG-200304 to OFG-200306].

66. Ofgem has considered whether there were ongoing circumstances (including the ongoing Ofgem internal counter-fraud investigation, the further contact received, on 21 December 2016, from Assembly member Jim Allister concerning Mr. Brimstone and similar contact from the DfE) that could have [arguably justified] a case for earlier voluntary disclosure of the further information to the PSNI. However, those considerations should be assessed in the context of the circumstances both at that time and then later in 2017. In December 2016 and early 2017, Ofgem's counter-fraud investigation fell short of suspected fraud and it was understood that the PSNI was no longer investigating the matter (as referred to at paragraphs 59 - 61 above).

67. By the time of Ofgem reconsidering the matter in May to July 2017, there were ongoing and additional circumstances that strengthened the justification for voluntarily disclosure that were not necessarily applicable at the time when first responding to the PSNI's written request in late 2016 / early 2017. At this later date in 2017, whilst Ofgem's counter-fraud investigation still fell short of substantiating suspected fraud, there was ongoing and increasing interest (and anticipated further interest) at a number of levels

regarding Mr. Brimstone's eligibility to the Scheme (which included the Inquiry being established; further scrutiny of the case by means of the second Ricardo site audit and the Deloitte review; and further engagement with the DfE regarding the case). As a result of this ongoing interest Ofgem considered that it was appropriate for it to voluntarily share the further information with the PSNI. All or any of the other officials and public bodies mentioned above could have contacted PSNI in relation to Mr. Brimstone's case. As such it was important for the wider effective and efficient exercise of functions and official roles for PSNI to be made aware by Ofgem of the further information.

(g) Ofgem's Current approach on sharing of information

68. As the Inquiry would expect, Ofgem continues to consider and refine its approach to ensuring compliance with its obligations in this area, including in light of the recent changes to legislation. In the interests of clarity, we can confirm that Ofgem's current approach is as follows in relation to the completion of a form / documenting decisions on data disclosure:

69. Where Ofgem wishes the police services or other law enforcement bodies to investigate concerns raised by Ofgem, a written request is not required from police / bodies in order for information to be disclosed.

70. If the police service (or another body with appropriate powers) is investigating something other than as a consequence of a referral by Ofgem and requires information from Ofgem, Ofgem will ask for this to be put in writing. Previously Ofgem did not require such information requests to be put on a specific form. However, Ofgem has recently implemented new training and guidance for sharing information in response to law enforcement information requests, to complement existing internal Ofgem information sharing guidance. Information requests from police services / law enforcement bodies should now be put in writing using Ofgem's specific form (as recommended by Leading Counsel at paragraph [87]); unless the request received already sets out the information detailed in Ofgem's form. A copy of Ofgem's standard request form to be used by law enforcement bodies and internal (GDPR Article 30) form to record decision-making on police information requests and processing activity are produced to the Inquiry as disclosure references "OFGEM 148041781", and "OFGEM 148041782".

71. Further, Ofgem has recently formalised a role of Data Protection Officer to ensure a robust approach to data protection matters. This, along with the role of General Counsel provides additional assurance as to Ofgem's approach to complying with data protection

legislation in the context of important police investigations. This role is described in Ofgem's Data Protection "appropriate policy document" produced to the Inquiry as disclosure reference "OFGEM 148041739".

72. Further, Ofgem notes ongoing constructive engagement with PSNI (and other authorities in Northern Ireland) on other cases.

73. In summary, while Ofgem accepts the process for sharing of information with the PSNI in this specific case of Mr. Brimstone could have been handled better, for the reasons outlined above this does not translate into wider issues either with Ofgem's approach, or with the DPA98 or DPA18. Wider conclusions cannot be drawn from the outcome of this specific, and one-off, incident.

II. Role of the Accounting Officer

74. In follow-up questions arising from Ofgem's oral closing submission delivered on Day 112 of the Inquiry's oral hearings, UOB raised [see TRA-16864] the following query with Ofgem Counsel, Mr. Beer QC:

> *I would be interested in any further comments that Ofgem wishes to make on its understanding of the reconciliation of its legal framework in relation to value for money and the duties of an accounting officer, because that's a problem faced by accounting officers in every part of publicly funded bodies.*

75. Ofgem wrote a letter, on 28 February 2019, which responds to this and related issues (disclosed with these submissions as OFGEM 148041788). This involved first, examining the terms of Ofgem's Accounting Officer's appointment letter and HM Treasury's Managing Public Money publication and second, considering how any such obligations might relate to Ofgem's interpretation of the scope of the Regulations.

76. First, as that letter notes, DN as current Accounting Officer of Ofgem is subject to HM Treasury's Managing Public Money publication, particularly Chapter 3. The standard appointment letter includes, within it, the following:

> *As an Accounting Officer, you must be able to assure Parliament and the public of high standards of probity in the management of public funds and assets. This will include…value for money across the whole of the public sector and not just your organisation.*

77. The scope of this statement is clearly important given that both Ofgem and the Department were involved in the Scheme. Ofgem has explained in the letter that its understanding is that this reference is about ensuring that the Accounting Officer follows guidance and best practice, which might be relevant to the broader public sector. It

highlights that procurement and pay are two areas where this is most relevant. In that context, the Accounting Officer must act in the interests of the public sector as a whole by not, for example, setting a precedent that may provide value for money for Ofgem but not the public sector as a whole.

78. Ofgem's position is therefore that the scope of the obligation in Managing Public Money is clear: it does not make Ofgem's Accounting Officer jointly responsible along with the Department's Accounting Officer for expenditure under the Scheme. Expenditure of funds under the Scheme remains solely the responsibility of the Department's Accounting Officer.

79. Second, can the duties of an Accounting Officer be used to change the interpretation of, in this case, secondary legislation that would otherwise arise from a plain reading of that piece of legislation?

80. Paragraphs 435 onwards of Ofgem's written closing submission sets out the reasons why value for money considerations cannot be used use to change the interpretation of regulations [see SUB-01121]. The same issues arise in relation to a value for money obligation placed on the Accounting Officer.

III. Peter Rice

81. In a recent witness statement [WIT-99322 to WIT-99344] Peter Rice notes concerns he had regarding the Scheme, including the matters of the RHI audit sampling methodology used and the internal accounting within Ofgem for the costs formulation of services provided by Ofgem in administering the Scheme. The Inquiry is respectfully requested to re-read the evidence within the following witness statements which address these matters: DN's first witness statement at [WIT-95077 to WIT-95081] and second witness statement at [WIT-95243 to WIT-95254; and WIT-95320-29]; EW at [WIT-114136 to WIT-114147]; Teri Clifton at [WIT-113063 (from para. 187) to WIT-113068; and WIT-113078]]; Chris Poulton at [WIT-282541; WIT-282598 (from para. 56) to WIT-282608]; and at Gareth John [WIT-283570 (from para. 41) to WIT-283576; and WIT-283579-80].

15 March 2019

JASON BEER QC

5 ESSEX COURT, TEMPLE

EMILY NEILL BL

BAR OF NORTHERN IRELAND

BLACKSTONE CHAMBERS, TEMPLE

Annex 1 – Abbreviations adopted in Ofgem's Supplementary Written Closing Submissions

CTI	Counsel to the Inquiry, Joseph Aiken
DN	Dermot Nolan
DPA18	Data Protection Act 2018
DPA98	Data Protection Act 1998
EW	Edmund Ward
GDPR	General Data Protection Regulation
ICO	Information Commissioner's Office
JJ	John Jackson
LPS	Land and Property Service of Northern Ireland
PH	Peter Hutchinson
PSNI	Police Service of Northern Ireland
SCx	Sarah Cox
ST	Samantha Turnbull
UOB	Dame Una O'Brien

Annex 2 – Details of PwC category 4 cases which involved domestic heat use

RHI Number	Accredited (Y/N)
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant i	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes
Irrelevant info	Yes

Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**No**
Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**Yes**
Irrelevant info	**No**
Irrelevant info	**Yes**