

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2023

Public Authority: Department for Business & Trade
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested the following information from Department for Business, Energy & Industrial Strategy (BEIS)¹: 'Details about the number of gas meters that are found to be faulty each year for the last 10 years' and '... the results of the IST [in-site testing] since 2013'. BEIS provided information in response to the second aspect of the request but withheld information related to the first aspect, relying on the exemption under section 44(1)(a) of FOIA (prohibitions on disclosure). Specifically, BEIS cited the statutory prohibition on disclosure created under the terms of section 105 of the Utilities Act 2000.
2. The Commissioner's decision is that BEIS was correct to withhold the information under section 44(1)(a) of FOIA.

¹ Although this request was submitted to BEIS, in February 2023 BEIS was replaced with a new government department, namely the Department for Business & Trade (DBT). This decision is therefore served on DBT albeit that the decision notice refers to BEIS as it was the body that handled the request and with whom the Commissioner corresponded about this complaint.

3. The Commissioner does not require BEIS to take any further steps in this case.

Request and response

4. On 2 September 2021 the complainant submitted a 13-part request seeking: 'Details about the number of gas meters that are found to be faulty each year for the last 10 years.' Part 1 of this request read: '1. Please can you state the make, model and serial number for each gas meter that was found to be faulty each year for the last 10 years.'
5. The complainant requested an internal review on 11 October 2021, following a lack of response to his request for information.
6. On 19 October 2021 BEIS responded. BEIS provided some information within the scope of the request but in relation to part 1 of the request refused to provide this information relying on the following exemption as the basis for doing so: section 43(2) (commercial interests) of FOIA.
7. The complainant requested an internal review on 20 October 2021, when he also requested additional information about the results of the in-site testing (IST) since 2013.
8. BEIS sent the complainant the outcome of its internal review on 5 November 2021. BEIS upheld its position to withhold the information but revised the exemption on which it relied. BEIS concluded that section 43(2) was incorrect, and it withheld information under section 44(1)(a) (disclosure prohibited under another legislation) here section 105 of the Utilities Act 2000. BEIS also stated that it would respond separately to the complainant's additional request of 20 October 2021 regarding the IST results since 2013.
9. BEIS sent that response on 15 November 2021. It confirmed that it held the information requested but that this was exempt from disclosure under section 43(2) of FOIA. BEIS carried out a public interest test, advising that the disclosure of the requested information would be likely to prejudice the interests of authorised energy suppliers by revealing market sensitive information which could be potentially useful to their competitors. BEIS also argued that the disclosure of commercially sensitive information would limit the amount of information received in future, especially when the information of this nature is received on a voluntary basis, thus limiting the effectiveness of Government activities, which would not be in the public interest.

Scope of the case

10. The complainant contacted the Commissioner 15 November 2021 to complain about the way his requests for information had been handled.
11. Specifically, in relation to his request for information made on 2 September 2021, about '...the make, model and serial number for each gas meter that was found to be faulty each year for the last 10 years', the complainant disputed BEIS's reliance on the exemption under section 44(1)(a) of FOIA to withhold the information.
12. The complainant also disputed BEIS's reliance on the exemption under section 43(2) to withhold the information, in response to his request for '...the results of the IST since 20213' made on 20 October 2021.
13. Upon detailed consideration of the complaint by the Commissioner discovered that, although the complainant raised concerns about responses to both requests for information, he did not make an actual request for internal review in relation to the response to the additional information request made on 20 October 2021.
14. Because of the passage of time and the close relevance of this part of the complaint to the original one, and to prevent even further delay, the Commissioner contacted BEIS on 3 November 2022 to enquire whether BEIS would agree for the Commissioner to proceed with the investigation in relation to the request of 20 October 2021 without the need for an internal review, providing that BEIS would maintain its position, had there been a request for internal review.
15. On 28 November 2022 BEIS, after liaising with the Office for Product Safety and Standards (OPSS) which was the part of department handling the request confirmed that, had there been an internal review, it would be likely to maintain its original position and therefore BEIS agreed for the Commissioner to proceed with the complaint.
16. Whilst awaiting BEIS's submissions, the Commissioner had been made aware that subsequent to his letter of 6 December 2023 to BEIS, on 23 December 2022 BEIS provided the complainant with a revised response to his request of 20 October 2021. In that response BEIS withdraw its application of section 43(2) and provided what it considered to be the results of the IST testing. Consequently, the Commissioner is satisfied that this particular aspect of the complaint has been resolved.

17. In light of the revised response, the Commissioner has considered that the scope of the investigation will focus solely on the remaining aspect of the complaint related to the request made on 2 September 2021.
18. Specifically, the Commissioner has considered whether, on balance of probabilities, BEIS was correct to rely on section 44(1)(a) to withhold the information falling within the scope of part 1 of the 2 September 2021 request.

Reasons for decision

Section 44 prohibitions on disclosure

19. Section 44(1)(a) of FOIA states that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment”

20. Part 1 of the complainant’s request of 2 September 2021 sought the following information which was withheld under section 44(1)(a) of FOIA:

“Please can you state the make, model and serial number for each gas meter that was found to be faulty each year for the last 10 years”.

21. BEIS considered that disclosure is prohibited by virtue of section 105 of the Utilities Act 2000 (the Act) which prevents Government from disclosing certain information and which states:

“105 General restrictions on disclosure of information.

(1) Information which—

(a) has been obtained under or by virtue of the provisions of this Act, Part I of the 1986 Act or Part I of the 1989 Act; and

(b) relates to the affairs of any individual or to any particular business, shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on, except as provided below.”

22. BEIS argued that this includes the withheld information obtained by the Office for Product Safety and Standards (OPSS, part of BEIS) under or by virtue of Part 1 of the Gas Act, specifically where it relates to an

individual supplier's business. BEIS considers that the withheld information falls under this prohibition for the reason that it contains the make, models and serial number of the gas meters provided by individual suppliers.

23. BEIS did not consider that any of the gateways to the prohibition provided by section 105 of the Act applied in this case.
24. BEIS considered each exception to the prohibition in turn, and confirmed that,
 - i. with regard to section 105(2) which allows disclosure upon consent, it does not have the necessary consent of the individual suppliers to disclose the requested information.
 - ii. section 105(3)(a) does not apply for the reason that the disclosure of the requested information does not facilitate the performance of any of the named parties in respect of the specified information.
 - iii. section 105(3)(aza),(azb),(azc),(aa),(ab),(ac),(b),(c) and (d), as well as sections 105(4) and 105(5) are not applicable in this case.
 - iv. Section 105(8) does not apply as OPSS is not the Authority as referred to under this provision and section 105(8A) does not apply as the information requested was not obtained under or by virtue of a 'relevant scheme' (defined as being a domestic electricity or gas price reduction scheme for Great Britain), or under or by virtue of regulations made under section 9(1) or (2) of the Energy Prices Act 2022.
25. The Commissioner notes that these gateways do not compel public authorities to disclose information but do allow it to disclose information for the purposes set out in these sections. In the case of *Dey v ICO and OFT (EA/2006/0057)* the Information Tribunal commented on the gateways and stated that "it gives a power to disclose, not a duty".
26. The Commissioner therefore accepts that BEIS has discretion as to whether or not to use the gateways to disclose specified information. However, in any event the Commissioner accepts BEIS' position that none of these gateways apply.
27. In the Commissioner's view, the operation of the statutory bar in this case is dependent on the consideration of whether the information, i.e.,

the make, model and serial number of the gas meters provided by individual suppliers, was obtained pursuant to one of the statutory functions covered by section 105(1)(a). The Commissioner is satisfied that this is the case as the information was obtained as part of gas meeting testing undertaken in accordance with Part 1 of the Gas Act 1986.

28. Furthermore, the Commissioner is satisfied that the withheld information directly relates to the affairs of a particular business i.e. the suppliers that provided the information, because it concerns a particular product that they have supplied.
29. Consequently, the Commissioner is satisfied that BEIS has correctly applied section 44(1)(a) to the withheld information.
30. As section 44 is an absolute exemption, there is no need to consider the public interest test. The Commissioner does not require BEIS to take any further action.

Procedural matters

31. Under section 10(1) of FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
32. Under section 17(1) if a public authority is refusing to disclose information it must provide the requester with a refusal notice within the same timescale.
33. In this case the complainant submitted their request on 2 September 2021. BEIS did not confirm whether it held the requested information nor did it issue a refusal notice in respect of the part 1 of the request until 19 October 2021.
34. BEIS therefore breached sections 10(1) and 17(1) of FOIA.

Other matters

35. On 6 December 2022 the Commissioner sent an investigation letter, requesting BEIS to respond to a number of points so that he could consider this complaint.

36. The Commissioner requested that the information was provided by 12 January 2023.
37. BEIS failed to meet this deadline. This led the Commissioner to issue an Information Notice under section 51 of FOIA on 7 February 2023 which required BEIS to provide a response to his enquires within 30 calendar days. BEIS did so, responding on 9 March 2023. It is regrettable that the Commissioner's investigation of this case was delayed due to the time it took BEIS to respond to his enquiries.

Right of appeal

38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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