

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2023

Public Authority: Department for Business & Trade¹

Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested the following information from the Department for Business, Energy & Industrial Strategy (BEIS):

"Please can (sic) you tell me which make and models of gas meters have been tested since 2013? To be honest I expected this in the results."
2. The Commissioner's decision is that BEIS was correct to withhold the information under section 44(1)(a) of FOIA.
3. The Commissioner does not require BEIS to take any further steps in this case.

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.

Request and response

4. On 23 December 2022, the complainant wrote to BEIS and requested information in the following terms:

"Please can (sic) you tell me which make and models of gas meters have been tested since 2013? To be honest I expected this in the results [by which the complainant meant BEIS' response to a previous request he had submitted to it]."
5. BEIS responded on 20 January 2023. It stated that it held the requested information but withheld it on the basis of section 44(1)(a) and section 43(2) as it considered the information to be commercially sensitive.
6. The complainant requested an internal review of the decision on 30 January 2023.
7. BEIS provided its internal review response on 22 February 2023 in which it maintained its original position. BEIS cited section 44 of FOIA on the basis of the prohibition from disclosure under the requirement of section 105 of the Utilities Act 2000 (the Act).
8. BEIS noted that one of the gateways allowing disclosure under section 105 of the Act was if the businesses consented to disclosure. Albeit, BEIS noted that the information would still be subject to section 43(2) of FOIA. However, following contact with a group of suppliers, where all but one refused their consent, BEIS maintained its position to withhold the information under section 44(1)(a).

Scope of the case

9. The complainant contacted the Commissioner on 23 February 2023 to complain about the way his request for information had been handled.
10. Specifically, the complainant disputed the reasons for which the information he requested was withheld and BEIS' reliance on the exemption under section 44(1)(a) of FOIA to withhold the information.
11. The Commissioner considers the scope of his investigation to be to determine whether BEIS was correct to rely on section 44(1)(a) to withhold the information.

Reasons for decision

Section 44 prohibitions on disclosure

12. 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”

13. The Commissioner noted that the nature of the requested information in the current complaint is essentially similar and relates to the complaint considered in the Decision Notice IC-141269-Z7Y6² which was issued to the complainant and BEIS on 30 March 2023. In the previous complaint, the complainant also requested information about the make and model of gas meters and was refused by BEIS relying on the exemption under section 44(1)(a) of FOIA. The Commissioner upheld BEIS’ application of section 44(1)(a).

14. Therefore, when considering this decision, the Commissioner will refer to the reasoning in his previous decision.

15. BEIS considered that disclosure of the requested information 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.”

16. 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

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024824/ic-141269-z7y6.pdf>

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

17. BEIS argued that the only gateway to the prohibition available under section 105 of the Act that could potentially allow the disclosure, would be the consent of every gas meters supplier under section 105(2).
18. BEIS confirmed that it approached a group of suppliers to obtain their consent to disclose the requested information to the complainant. However, of the five approached four did not consent for the reason that the information relates to the affairs of individual businesses being carried on besides their own, namely meter owners. BEIS argued that it does not have the necessary consent from the relevant suppliers and therefore is prohibited from the disclosure of the information.
19. BEIS also explained that even if the consent of the relevant suppliers was obtained, this would require a further consideration under section 43(2) of FOIA, which may exempt information from disclosure, subject to the public interest test, when the information would be likely to prejudice the commercial interest of any legal person.
20. 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 and model 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.
21. 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. In addition the Commissioner is satisfied that BEIS does not have the consent of the businesses in question to disclose the withheld information and therefore the gateway at section 105(2) of the Act does not apply.
22. Consequently, the Commissioner is satisfied that BEIS has correctly applied section 44(1)(a) to the withheld information.
23. 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.

Right of appeal

24. 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

25. 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.
26. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF