

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2022

Public Authority: Department for Business, Energy and Industrial Strategy ("BEIS")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on the "Primary Authority Scheme" regarding the "blocking" of enforcement action against businesses.
2. The Commissioner's decision is that BEIS is entitled to withhold the requested information in reliance of FOIA section 43(2) – Commercial interests.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The Office for Product Safety and Standards (OPSS) is a departmental office within BEIS which acts on behalf of the Secretary of State in relation to decision making in the Primary Authority. The Primary Authority Register ("the Register") is hosted by BEIS. BEIS is not involved in the provision of advice nor does it monitor proposed enforcement actions or their outcomes. Where a determination is applied for BEIS manages the process on behalf of the Secretary of State.
5. The Primary Authority Scheme (the "Scheme") was established by the Regulatory Enforcement and Sanctions Act 2008 (the "2008 Act"). The 2008 Act allows regulators, such as Trading Standards, Environmental

Health and Fire and Rescue Services to form legal partnerships with businesses.

6. The Scheme enables Primary Authority Partnerships (PAP's) to be established whereby businesses can request specific advice from the regulator on how laws apply to their products, business model, advertising, and other legal areas within scope of the Scheme, as defined in the 2008 Act. In return the regulator can recover the costs of providing this non-statutory service.
7. Where a primary authority gives advice to its partner business, and that advice is followed, the primary authority can 'block' another authority from taking enforcement action where that enforcement action conflicts with the advice. This 'blocking' is described in the 2008 Act as 'directing against' proposed enforcement action.
8. Where a business has a PAP then any proposed enforcement action must be notified to the primary authority, via the Register website. The primary authority will then consider whether it wishes to direct against the proposed enforcement action on the basis that the proposed enforcement action is inconsistent with advice the primary authority has previously given to that business.
9. BEIS explained that the primary authority needs to ensure that the advice it gave was correct (that is, consistent with the law and that the law has been applied to the particular circumstances of the business) and properly given (that is, issued with due regard to the relevant requirements of the Primary Authority Statutory Guidance¹ (the "Guidance")). This is necessary because if the enforcing authority believes that the proposed action should be allowed to proceed, having considered the primary authority's reasons for the direction against, the enforcing authority may apply to the Secretary of State for consent to refer the matter for determination on the basis that the advice the primary authority gave the business was not correct, not properly given, or is not inconsistent with that advice.
10. The process of requesting a determination is a statutory safeguard to the Scheme where regulators are in dispute about the blocking of the proposed enforcement action. Determinations only take place when one of the businesses, enforcing authority or primary authority disagrees with the direction against enforcement action.

¹ <https://www.gov.uk/government/publications/primary-authority-statutory-guidance>

11. BEIS advised that in many cases a primary authority will not block the proposed enforcement action for a variety of reasons and the enforcing authority will be able to proceed as it chooses. Any consideration and decision in directing against or allowing the proposed enforcement action is made by the primary authority. OPSS does not consider the merits of the information submitted and would only do so in the event of a determination being required.
12. OPSS has been made aware of a number of incorrect notifications by local authorities that have been blocked as such. For example, where the notification has been submitted as an enforcement notification when it concerns gathering evidence at the investigative stage of a matter. OPSS liaises with the Primary Authority Regional Groups (PARG) on a regular basis to upskill users of the Register including to address these incorrect notifications.
13. BEIS added that it is important to note that where enforcement action is initially proposed, it may not take place. Engagement with the business may lead to an alternative approach. Engagement is an important consideration under the Regulators' Code, for example in respect of advice, requirements or decisions a regulator makes it "should provide an opportunity for dialogue...with a view to ensuring that they are acting in a way that is proportionate and consistent". Equally where an enforcing authority takes enforcement action, the action may not be successful – for example the business may be found not guilty of an offence or successfully appeal a fine or notice.
14. The knowledge a business holds in respect of proposed enforcement action would be a matter for individual authorities to decide upon based on their own policy, PAP terms and their relationship with the primary authority business.

Request and response

15. On 22 July 2021, the complainant wrote to BEIS and requested information in the following terms:
 - "1. Do you have a database of all enforcement actions that have been "blocked" under the Primary Authority scheme? If so, please can you provide this database in a spreadsheet or searchable format?
 2. Please can you list of all enforcement actions that have been "blocked" under the Primary Authority scheme, including the business name, date, type of enforcement action, issue that prompted the action, reason for refusal, enforcing authority and primary authority up until June 2021 (going back as far as it affordable within FOI cost limits)? Please can you provide the data in spreadsheet format.

3. Do you have a database of the amount paid by businesses, with current primary authority partnerships, to primary authorities for the services provided under the cost recovery rules? If so please can you provide this database in a spreadsheet or searchable format?
4. Please can you list the amount paid by each business, with a current primary authority partnership, to their primary authority for the services provided under the cost recovery rules? Please can you provide the data in spreadsheet format."
16. BEIS responded on 5 August 2021 relying on FOIA section 43(2) – commercial interests to withhold information in the scope of the first two points of the request whilst confirming that no information was held in respect of points 3 & 4 of the request.
17. On 6 August 2021 the complainant requested an internal review relating to points 1 & 2 of the response. In regard to section 43(2) they emphasised that:
- "...local authority enforcement action is regulatory action taken by officers of a local authority, not a marketing strategy or pricing policy belonging to a company."
18. Following an internal review BEIS wrote to the complainant on 8 August 2021. It stated that it upheld the application of section 43(2) and added reliance on section 31 – law enforcement.

Scope of the case

19. The complainant contacted the Commissioner on 14 September 2021 to complain about the way his request for information had been handled. He advised:
- "I wish to appeal against the decision of the OPSS to withhold a database of blocked enforcement actions (relating to Q1 and Q2 of FOI2021/18491) on the following grounds:
- 1) the department has not demonstrated disclosure would prejudice commercial interests,
 - 2) in any event the public interest in disclosure outweighs other concerns and
 - 3) disclosure would not frustrate the ability of councils to reach appropriate enforcement decisions.
- A) The OPSS / BEIS already publishes details of disputed Primary Authority decisions, including naming companies, without any statement

from the companies <https://www.gov.uk/guidance/primary-authority-determinations>². This demonstrates blocked enforcement actions can be released without damaging commercial interests.

B) There is an overwhelming public interest in disclosing proposed regulatory actions blocked under the primary authority scheme. Primary authorities can and do frustrate other councils, who have been forced to take enforcement action to protect people from unsafe food, workplaces and products. Primary Authority determinations show council have been wrongly prevented enforcement action. This could be just the tip of an iceberg as only a tiny minority of blocked proposals are examined by the OPSS.

C) There is no evidence disclosure would hamper the ability of local authorities to reach decisions. I'm not asking for correspondence. In any case, the publication of primary authority determinations does not prejudice the administration of justice. Further transparency would aid the administration of justice by allowing these decisions to be scrutinised by the public."

20. The Commissioner considers the scope of his investigation to be the application of FOIA sections 43(2), 31(1)(c), 31(1)(g) and 31(2)(g) to the withheld information.

Reasons for decision

22. Section 43- commercial interests

Section 43(2) of FOIA states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

23. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

² <https://www.gov.uk/guidance/primary-authority-determinations>

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. disclosure 'would be likely' to result in prejudice or disclosure or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

24. BEIS quoted the Commissioner's guidance in describing commercial interest relating:

"to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."³

25. Regarding the parties whose commercial interests would be likely to be prejudiced BEIS advised that this would include all those businesses who have a PAP where enforced enforcement action against them has been blocked. BEIS considers that this association with an offence, when the business has not been given a chance to demonstrate that it has not committed the offence, would be likely to prejudice its commercial interests. In comparison, where enforcement action against a company outside of the Scheme has not been pursued, that information would not be made public. BEIS explained that where a business is not part of a PA relationship, if enforcement action is taken against them, there is not a block mechanism similar to that of a PA. However, there are routes of appeal against such a notice which are specific to the particular legislation being regulated.

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

26. Regarding the publication of enforcement action the OPSS publishes a report⁴ on enforcement action it has taken in line with its enforcement strategy. Local authorities will make decisions on communicating enforcement actions in line with their own enforcement strategies. However, the Regulators' Code⁵ which applies to local authorities, sets out that regulators should ensure that their approach to their regulatory activities is transparent.

26. BEIS also considers that the commercial interests of the local authority would be likely to be prejudiced from the disclosure given that it is entitled to charge a business on a costs recovery basis for services that it provides in exercising its primary authority functions. It explained:

"In the event a business loses confidence in the Scheme as a result of the disclosure of information it may well refuse to pay these costs. Should a local authority be unable to recover its costs thereby affecting its financial standing, that local authority may find it more challenging to contract with other businesses to obtain their services, given these businesses may consider it less risky to offer their services to other local authorities or organisations."

27. BEIS explained that it was not proportionate to contact the large number of businesses involved to consult with them regarding their views. However, it considers that it has prior knowledge of businesses' concerns and is aware that the businesses in the Scheme hold:

"...strong views that information disclosed to their primary authorities and anything within the scheme is kept confidential. For example, this concern has been expressed by many businesses in sessions at the 10 year Primary Authority event held on 26 and 27 February 2020 when we discussed assured advice and inspection plans."

28. In requesting an internal review the complainant explained their view on the response to their request:

"...it is simply not true that local authority enforcement action is 'market sensitive' or 'might be used by competitors'."

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1088386/opss-enforcement-actions-october-2021-march-2022.pdf

⁵ <https://www.gov.uk/government/publications/regulators-code>,

29. The Commissioner has considered BEIS' application of section 43(2) with regard to the criteria set out in paragraph 23. In respect of the first criterion the Commissioner accepts that the alleged harm relates to the commercial interests of the businesses listed in the withheld information.
30. The Commissioner has viewed a sample of the withheld information. He considers that the second criterion is met because the disclosure of the requested information could cause actual prejudice to businesses' commercial performance by placing information into the public domain which could undermine a business's reputation particularly in comparison with other businesses who are not part of the Scheme and therefore not subject to the same scrutiny. He notes that those businesses not part of the scheme could successfully appeal enforcement action without disclosure that the enforcement action had, in effect, been 'blocked'. This could result in the distortion of competition and commercial prejudice to the disclosed businesses.
31. BEIS argued that local authorities acting as primary authorities could also be commercially prejudiced as a result of the requested information being disclosed. The Commissioner notes the explanation provided by BEIS in paragraph 26 but considers that the circumstances set out there appear somewhat remote. The Commissioner is not persuaded that the alleged prejudice is of substance. He is not convinced that businesses with agreements with primary authorities would refuse to pay any previously agreed costs nor that any shortfall, should it materialise, could have a substantial effect on the financial standing or commercial interests of those authorities.
32. BEIS advised the Commissioner that the level of the likelihood of prejudice being relied on is that disclosure 'would be likely to' result in prejudice. The level of prejudice must be supported by the public authority's submissions. In this case, having considered the information and supporting submissions, the Commissioner is satisfied that the lower threshold has been met.
33. The Commissioner therefore considers that section 43(2) is engaged in regard to the requested information.

The public interest

34. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

35. BEIS explained:

"We acknowledge that disclosing the information requested would provide greater transparency in Government processes. We acknowledge also that it would promote transparency around public decision-making which may also promote public understanding and accountability in respect of the operation of the Scheme, namely in respect of the type of issue and proposed enforcement action that has been blocked, the type of businesses that have been subject to the block, the reasons for blocking enforcement action, and the frequency with which certain primary authorities have blocked proposed enforcement actions. We acknowledge that this in turn could maintain and increase public confidence and trust in the Scheme."

36. The complainant explained their view:

"The OPSS has failed to properly consider the public interest in disclosure. There is an overwhelming public interest in disclosing regulatory actions blocked under the primary authority scheme. Primary authorities oversee the regulation of food safety, workplace safety and product safety – matters of considerable public importance. These authorities can and do frustrate other councils, who have been forced to take enforcement action to protect people from unsafe food, workplaces and products. These decisions are often controversial and should be scrutinised by the public on a case by case basis – not hidden in the dark recesses of the OPSS's computer systems. The public rightly expect that businesses that endanger customers and employees face sanction. Yet currently there is no way of knowing or judging if the system is working and protecting the public or letting offending companies off the hook. Transparency would aid understanding of this important system and allow the public to judge for themselves. Withholding the data, risks undermining faith in the whole regulatory system. Moreover, this culture of secrecy could be putting the public at risk by allowing companies to evade sanction for infringements."

Public interest in favour of maintaining the exemption

37. BEIS explained that the role of the Secretary of State in the Scheme results in it receiving commercial information from and about companies that assists government to fulfil its functions more effectively. It therefore considers that there is a significant public interest in ensuring that companies are not discouraged from participating in the Scheme.

38. As set out above in paragraph 19 point A) the complainant references information already in the public domain concerning challenges made to the Primary Authority blocking enforcement actions identified in the URL he provided. He considers that this "demonstrates blocked enforcement actions can be released without damaging commercial interests".

39. BEIS relies on this disclosure to demonstrate transparency:

“In any case where a primary authority directs against the proposed enforcement action, the enforcing authority can apply to the Secretary of State for consent to refer the matter for determination. The outcomes of determinations are published and may be challenged via judicial review, thus ensuring transparency. Accordingly, should the enforcing authority have any concerns about the probity of the decision to block its proposed action, the determination process is available to the enforcing authority to test its concerns.

Hence, the decision of an enforcing authority not to seek determination can be construed as an indication there was no concern about the primary authority’s probity in blocking the action. The public interest would not be served by disclosure outside of these provisions, which would serve to lower the confidence regulatory authorities and businesses have in the Scheme, undermining their participation and co-operation in it.”

40. BEIS considers that disclosure of the requested information would be detrimental to a key purpose of the primary authority (namely to assist local authorities to determine whether the regulatory action is justified) by undermining regulatory authorities’ and businesses’ participation and co-operation in the Scheme. In BEIS’ view this would not be in the public interest because the Scheme assists with the efficient and effective use of regulatory resource.

Balance of the public interest

41. The Commissioner agrees with the points described by BEIS in paragraph 35 which provide a weighty argument in favour of disclosure. However, he considers that there are compelling points to consider in favour of maintaining the exemption.
42. There is the important purpose addressed by primary authorities, to assist local authorities in determining whether regulatory action is justified. The Commissioner is aware of the complainant’s concern that the primary authorities are in a position to frustrate local councils’ enforcement action. The Commissioner notes that there is a process in place, as described above in paragraph 9 to challenge the primary authorities’ decisions and to escalate this to the Secretary of State and beyond that to judicial review. Provision for this accountability is covered by the Regulatory Enforcement and Sanctions Act 2008⁶.

⁶ <https://www.legislation.gov.uk/ukpga/2008/13/contents>

43. The complainant appears to suggest that the primary authorities do not act in the best interests of the public and by blocking enforcement action put public safety at risk. The Commissioner has not been provided with any evidence to support this premise. The complainant suggests that withholding the requested information "risks undermining faith in the whole regulatory system".
44. The Commissioner also notes that if potential offences considered by the enforcement authorities are not pursued the businesses may not be aware of the discussions which have taken place between the primary authority and local enforcing authority and therefore would not have had the opportunity to put their case. The Commissioner cannot see how disclosure of the requested information in this circumstance would serve the public interest.
45. The Scheme which currently operates is one in which businesses choose to take part. The Commissioner considers there to be a strong public interest in allowing the Scheme to operate within the statutory guidance. His view is that, for the reasons explained in this notice, the likelihood of disproportionate prejudice to those businesses taking part in the Scheme is not in the public interest.
46. On balance, and in the particular circumstances of this case, the Commissioner is persuaded that the public interest lies in maintaining the exemption.
47. As the Commissioner has found that the section 43 exemption applies he has not gone on to consider the exemptions at section 31.

Right of appeal

48. 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

49. 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.

50. 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

Susan Hughes
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