

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2021

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 about a licence to operate as a consumer enforcement body, provided by Central Government to the Advertising Standards Authority ('ASA').
2. The Commissioner's decision is that BEIS does not hold the requested information and has complied with section 1 FOIA by informing the complainant that it does not hold the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 8 July 2020 the complainant wrote to BEIS and requested information in the following terms:

"The details of the license provided by Central Government to the Advertising Standards Authority, to operate as an appointed Consumer Enforcement Body.

Specifically, I request details of:

- License
- Terms and Conditions
- Monitoring Activities

If the license is not held within BEIS, I request the details of which government department holds the license.”

5. BEIS responded on 21 July 2020. It stated that it did not hold any information in the scope of the request.
6. Following an internal review BEIS wrote to the complainant on 19 August 2020. It advised the complainant that the Advertising Standards Authority (ASA) is an independent industry body¹ which serves as a self-regulator and that no licence is provided by Central Government to the ASA to operate as an appointed consumer enforcement body.

Scope of the case

7. The complainant contacted the Commissioner on 28 August 2020 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be if BEIS has correctly stated that it holds no relevant information in the scope of the request.

Reasons for decision

Section 1 – information held

9. Section 1 of the FOIA states that:

“(1) Any person making a request for information to a public authority it entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

10. To make a determination on whether a public authority holds information the Commissioner applies the civil test which requires her to consider the question in terms of the balance of probability.
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¹ the ASA is a non-statutory organisation and so cannot interpret or enforce legislation

11. This case differs from most section 1 cases where the Commissioner asks the public authority to furnish her with details of the searches undertaken by it in responding to the request. BEIS explained both to the complainant, at internal review, and to the Commissioner that a licence as described by the complainant does not exist.
12. The Commissioner considers that it would be neither proportionate nor reasonable to ask BEIS to search for information which it has clearly explained cannot exist. Unfortunately the complainant refuses to accept this position and is convinced that information is held. His unwavering view is that information in the scope of his request is held and alleges that BEIS is deliberately not providing that information.
13. The complainant explained his view that whether or not a licence exists BEIS or another government department must conduct monitoring activities in respect of the ASA's work and therefore information must be held on those activities.
14. The Commissioner asked BEIS for clarification on this matter irrespective of the existence, or not, of a licence.
15. BEIS explained:

"As far as BEIS is aware, no Government department carries out "monitoring activities" on the ASA. The ASA is an independent advertising regulator and administers Codes for broadcast and non-broadcast advertising. The ASA receives complaints from members of the public/companies about misleading advertising and breaches of the Codes. The ASA will look at compliance and where a company is not following the Code, will take action by asking for the advert to be amended or removed. Failure to comply can result in the complaint being passed to Trading Standards for appropriate enforcement action, the ASA has no powers to take enforcement action itself."
16. BEIS further explained that it does not hold any information about the ability of ASA to refer cases to Trading Standards but if required this would be sought by the ASA independently. Moreover, Trading Standards are operated and resourced by local authorities with the Local Government & Social Care Ombudsman being the regulator handling complaints about Trading Standards.
17. The complainant remained dissatisfied with the Commissioner's further explanations and advised her that he considers the part of his request for "monitoring activities" should be interpreted broadly. He stated:

"ASA codes have been revised and updated in the last 5-10 years and the DCMS and BEIS have played an integral part in the development of

those codes, especially the non-broadcast code. Further to that the ASA has been forced by one of these departments, probably BEIS, to also investigate breaches of the consumer protection from unfair trading regulations when investigating breaches of advertising standards. That was directly imposed upon the ASA by BEIS or DCMS. These departments cannot therefore refute that they have direct input and control over the operations of the ASA.”

18. On this basis, the Commissioner asked the complainant for evidence to support his view that BEIS, or another department, monitors the ASA’s activities.
19. The evidence provided by the complainant comprised the following URLs:
 1. <https://www.hatads.org.uk/catalogue/advertising-controls/29/Advertising-Standards-Authority>
 2. <https://www.ofcom.org.uk/consultations-and-statements/category-2/proposed-extension-to-the-remit-of-advertising-advisory-committee>
 3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/829775/2. ASA - Advertising Standards Authority.pdf
 4. [Regulation of advertising by the ASA - House of Commons Library](#)
 5. <https://www.gov.uk/marketing-advertising-law/regulations-that-affect-advertising>
 6. [Government wants to ban all junk food ads online - CBBC Newsround](#)
 7. [New public consultation on total ban of online advertising for unhealthy foods](#)
 8. <https://www.asa.org.uk/asset/637A3980-4E7B-493E-944AEC20DA15115E/>
20. The URLs were provided with no further explanation. The Commissioner therefore accessed the material to understand how the documentation comprised evidence of monitoring activities.
21. The Commissioner acknowledges that the material mentions the ASA, however, she is unable to see evidence of any government department monitoring the ASA’s activities.
22. She notes that there is a relationship between government and the ASA. For example, in the third URL, she read:

“The ASA is engaging with government in the development of that review” [relating to the review of online advertising regulation]
23. In the seventh URL she notes that there was described, on 20 November 2020, a new public consultation from the Department of Health and

Social Care and the Department for Digital, Culture, Media and Sport into the banning of online advertising for unhealthy foods.

24. However, her view is that the URLs demonstrate only a link between work undertaken by Government and the ASA, not that Government is monitoring the activities of the ASA. The URLs also demonstrate that the Government is interested and engaged with the work of the ASA but this does not comprise 'monitoring' by any reasonable definition of the term. Moreover, the fourth URL states:

"The ASA is independent of both the Government and the advertising industry. It is recognised by the Government and other regulators as the body to deal with complaints about advertising."

25. In the absence of any evidence to the contrary, the Commissioner must conclude that there is no licence, as described in the request, held by BEIS, and therefore no terms and conditions and no information on any "monitoring activities".
26. The complainant has not provided any compelling argument as to why this information would be held and the Commissioner considers BEIS's representations to be credible. She therefore finds, on the balance of probability, BEIS has complied with section 1 of the FOIA by informing the complainant that it does not hold the requested information.

Right of appeal

27. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.

29. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF