

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 22 July 2009

**Public Authority:** Office of Communications ("OFCOM")  
**Address:** Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

### Summary

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The complainant requested statistics which formed the basis for a report produced by OFCOM. The information was withheld under section 44 of the Act (prohibitions on disclosure). OFCOM stated that the relevant statutory prohibition was section 393 of the Communications Act 2003. The Commissioner has considered the complaint and is satisfied that the requested information falls within the scope of the statutory prohibition and that the section 44 exemption, therefore, applies.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 5 July 2007 the complainant wrote to OFCOM and, with reference to an OFCOM publication - 'Broadcasters' Returns on Equal Opportunities 2005, Summary Report and Statistics' - requested the following:

"...the full report containing the statistical data for each of the 138 licencees from whom you have returns."

3. OFCOM responded on 19 July 2007 and stated:

"The information is being withheld as it falls under the exemption in section 44 of the Act. Under this section information which we hold on this subject is exempt

from disclosure since it was obtained in exercise of a statutory power and disclosure is prohibited under section 393 of the Communications Act 2003. Section 44 is an absolute exemption under the Act and does not require a public interest test.”

4. On 19 September 2007 the complainant wrote to OFCOM and asked it to reconsider the decision to refuse to provide the requested information. The complainant asked OFCOM to consider the following in reviewing the decision:
  - that section 393(2) of the Communications Act 2003 permits disclosure “made for the purpose of facilitating the carrying out by OFCOM of any of their functions”. The complainant argued that the specified information fell into this category, and
  - that OFCOM’s decision to withhold the information “....defies the precedent set by OFCOM’s predecessor regulatory body, the Independent Television Commissioner, which published precisely the data we requested for all its licencees – including each ITV franchise individually – on an annual basis.”
  
5. On 26 October 2007 OFCOM wrote to the complainant with the outcome of its internal review of their handling of the request. OFCOM confirmed that the internal review upheld the original decision to withhold the requested information. In response to the complainant’s queries OFCOM stated:
  - “Disclosure of the information you have requested is not, in our view, necessary to facilitate the carrying out of our functions and we are not persuaded that there is any case that it would be.”
  - “....OFCOM is operating in a different landscape to that previously regulated by the ITC [The Independent Television Commission].... the ITC was also not under the same obligations as OFCOM now is by the operations of the Freedom of Information Act and as we have indicated, we are prohibited by Statute from releasing the information you have requested.”
  - “The collection of statistics is a separate matter to that of our duty under section 337 and has a different level of significance amongst this cohort of licencees when compared to those reported on by the ITC.”
  
6. OFCOM also provided the complainant with a copy of a letter (dated 2 October 2007) sent to the Managing Directors of all broadcasters subject to its regulation. This letter explained that OFCOM was prohibited by the Act from releasing the detailed statistics specified in the request but urged broadcasters to provide this information if approached.

## The Investigation

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### Scope of the case

7. On 19 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following:
- Section 393(1) of the Communications Act 2003 states that information with respect to a particular business obtained in exercise of a power conferred by the Act is not to be disclosed without the consent of the business in question. However, section 393(2) of the Communications Act 2003 disengages the statutory prohibition on information disclosure where disclosure is made for the purpose of facilitating the carrying out of any of OFCOM's functions. The promotion of equal opportunities in relation to employment by licencees under OFCOM's jurisdiction is one of the duties of OFCOM. Therefore, the requested information can be disclosed without seeking the consent of the businesses in question.
  - The decision to withhold the requested information defies the precedent set by OFCOM's regulatory predecessor, the Independent Television Commission (the "ITC"), which was publishing this information after the passage into law of the Freedom of Information Act 2000. In withholding the information OFCOM is attempting to keep secret that which was formerly put in the public domain.
  - There are public interest arguments in favour of disclosing the information. Notably, OFCOM awards licences to broadcasters on behalf of the public and the public has a right to know how broadcasters are performing as equal opportunity employers.
8. The Commissioner proceeded to investigate OFCOM's handling of the request with reference to whether the Communications Act 2003 does, in fact, provide for a prohibition on disclosure in respect of the withheld statistical information, or whether any provision contained therein allows for its disclosure. However, as the section 44 exemption is absolute, he did not take into account whether there is a public interest in favour of disclosing the information.

### Chronology

9. On 23 January 2008 the Commissioner contacted OFCOM and sought further information about its handling of the request. He set out his initial view that it seemed likely that the requested information fell within the scope of the statutory prohibition. However, in order to ascertain whether this view was correct, the Commissioner asked OFCOM to address the following specific points:
- (i) In responding to the request did OFCOM seek or consider seeking the consent of the licencees who contributed to the report identified in the request?
  - (ii) If it did not seek consent, does OFCOM consider that the seeking of consent might have been appropriate given that the Act provides a presumption in favour

- of disclosure and that the requested information had formerly been made available by OFCOM's regulatory predecessor?
10. On 5 February 2008 OFCOM telephoned the Commissioner and enquired whether it would be possible to discuss the matters raised in a telephone conference, prior to OFCOM formerly responding. The Commissioner agreed to this course of action.
  11. On 12 February 2008 the Commissioner held a telephone conference with members of OFCOM. During the course of the discussion OFCOM made the following points:
    - Since ITC released a detailed breakdown similar to that specified in the request, the Communications Act 2003 has come into force and there has been a growth in the number of licencees. So, both the context in which the regulator operates and its associated duties have changed.
    - OFCOM did consider writing to seek the consent of the licencees in question but concluded (from past contact experience) that many would not respond without further prompting and at least some would impose conditions upon disclosure. As a compromise and, in consideration of their duties under section 16 of the Act, OFCOM wrote to the licensees (letter provided to the complainant, see paragraph 6 above) and recommended that they make their individual statistics available on request.
    - OFCOM also made reference to a previous ruling by another jurisdiction which related to an analogous statutory prohibition where consent was a conditional factor.
  12. OFCOM agreed to write to the Commissioner to set out these points in more detail and to formally respond to his initial letter of enquiry.
  13. On 29 February 2008 OFCOM wrote to the Commissioner and clarified the following:
    - OFCOM's predecessor, the ITC, did publish certain information relating to diversity within broadcasters. However, this was in very different circumstances to the present and related only to the main analogue terrestrial television broadcasters.
    - By contrast, OFCOM is required under section 337 of the Communications Act 2003 to ensure that all licensed television and radio broadcasters make arrangements for promoting equality of opportunity in relation to employment with them. OFCOM also has a separate duty under section 27 of the Communications Act 2003 to promote equal opportunities in employment by television and radio service providers. In line with these responsibilities, OFCOM requires all its television and radio licensees who meet the statutory threshold (i.e., those who employ more than twenty individuals or who broadcast for more than thirty-one days a year) to provide an annual report on the effectiveness of the arrangements they are required to have in place and has, in some instances, asked for this information under its formal information collecting powers.

- Section 393(1) of the Communications Act 2003 states:  
“...Information with respect to a particular business which has been obtained in exercise of a power conferred by (*this Act*), is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.”

As the information requested is information with respect to a particular business (i.e., the broadcasters) which has been obtained by OFCOM in exercise of a power conferred under the Communications Act 2003 (sections 27 and 337) it is, therefore, subject to the statutory bar in section 393(1) of the same Act.

- With regard to the issue of consent, OFCOM stated that they considered they were not under any obligation to obtain the consent of broadcasters in order for disclosure under section 393(1) of the Communications Act 2003. In support of this position OFCOM made reference to a decision notice issued by the Commissioner (ICO case reference FS50069723) which addressed a similarly worded statutory prohibition (section 348 of the Financial Services and Markets Act 2000) and found that the public authority in question was under no obligation to seek consent from parties to which the information related. This interpretation was not challenged by the Information Tribunal (appeal reference: EA/2005/0019).
  - Whilst OFCOM did, nevertheless, consider seeking the broadcasters' consent for the disclosure of the information they decided that, in view of the unlikelihood of a prompt, positive response from all parties (many broadcasters failed to provide OFCOM with relevant data in a timely fashion, some failed to respond at all for three consecutive years) it would be an unreasonably burdensome process. In writing to the broadcasters in question and asking them to provide their individual statistics when prompted, OFCOM considered they had promoted a helpful compromise and acted in the spirit of section 16 of the Act.
14. On 6 March 2008 the Commissioner wrote to the complainant and explained that, based on OFCOM's representations, the Commissioner's initial view was that the requested information fell within the scope of the statutory prohibition set out under section 44 of the Act. As any decision notice would, therefore, be unlikely to uphold their complaint and promote access to the requested information the complainant was invited to withdraw their complaint. The Commissioner therefore invited the complainant to respond to this initial view.
15. On 26 March 2008 the complainant wrote to the Commissioner and stated that he did not wish to withdraw his complaint. He also confirmed that he disagreed with the Commissioner's initial view and asked him to consider the following in formulating his decision:
- (i) The statutory bar in section 393(1) of the Communications Act 2003 does not apply to anything which OFCOM does for the purpose of facilitating the carrying out of any of their functions. In seeking the relevant statistics from the businesses

OFCOM was doing so in relation to carrying out its functions to license and to ensure that the conditions imposed in relation to the licensing were being complied with.

(ii) Compelling evidence that section 393(1) does not prohibit disclosure is provided by the fact that OFCOM's predecessor, the ITC, used to publish the requested information in its annual report, despite being subject to an identically drafted statutory provision and bar on disclosure under the Broadcasting Act 1990.

## Analysis

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16. The full text of the relevant statutes referred to in this section is contained within the legal annex.

## Exemption

### Section 44

17. In refusing the request OFCOM has relied upon the exemption set out in section 44 of the Act. Section 44 is engaged where information requested is either prohibited from disclosure under any enactment, is incompatible with any Community obligation, or would constitute or be punishable as a contempt of court. The specific subsection invoked by OFCOM in this instance is section 44(1)(a) which confers an exemption where disclosure of requested information "is prohibited by or under any enactment".
18. Section 44 is an absolute exemption so any information falling within its scope is exempt and there is no requirement for public authorities to consider whether in all the circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
19. OFCOM has stated that the statutory prohibition on disclosure in this instance is provided by section 393(1) of the Communications Act 2003. Section 393(1) states:
- "General restrictions on disclosure of information
- (1) Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by—
- (a) this Act....
- ...is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business."
20. In order to establish whether the requested information falls within the scope of the prohibition the Commissioner first considered whether the information requested is in respect of a particular business.

21. As the information requested in this case is statistical information pertaining to each of the 138 participating licencees referred to in the "Returns on Equal Opportunities 2005, Summary Report and Statistics", the Commissioner is satisfied that it is information in respect of a particular business.
22. Having established this the Commissioner then considered whether the information was obtained by OFCOM in exercise of a power conferred by the Communications Act 2003.
23. With regard to OFCOM's functions, section 1(1) of the Communications Act 2003 states:

"The Office of Communications ("OFCOM") shall have the following functions—  
(a) the functions transferred to OFCOM under section 2; and  
(b) such other functions as may be conferred on OFCOM by or under any enactment (including this Act)."
24. Section 2(1) of the Communications Act 2003 confirms that, amongst the functions of the ITC which were transferred to OFCOM are those set out under Schedule 1. Those functions relevant to the complaint under investigation include:

"(a) the function of granting or awarding licences under Part 1 of the 1990 Act (independent television services) and Part 1 of the 1996 Act (digital television broadcasting);  
(b) the Commission's functions under those Parts in relation to, and to applications for, licences under either of those Parts;"
25. One of OFCOM's functions, therefore, is the granting of licences to television broadcasters (the function of granting of licences for radio broadcasters is also established within Schedule 1).
26. Moreover, under section 337 of the Communications Act 2003, OFCOM is required to ensure that, as part of the conditions of their licence, all licensed television and radio broadcasters make arrangements for promoting equality of opportunity in relation to employment with them. Additionally, section 263(2) imposes a duty upon OFCOM to:

"...do all that they can to secure that the holder of every such licence complies, in relation to the licensed service, with the conditions so included in the regulatory regime for that service"
27. With regard to the powers conferred upon OFCOM by the Communications Act 2003, section 1(3) states:

"OFCOM may do anything which appears to them to be incidental or conducive to the carrying out of their functions, including borrow money."
28. This gives OFCOM the power to do anything provided it is related to the carrying out of their functions. More specifically, the Commissioner has also taken account of section 27(2) of the Communications Act 2003. This states that it shall

be the duty of OFCOM to take all such steps as they consider appropriate for promoting equality of opportunity in relation to both—

- (a) for employment by persons providing television and radio services; and
- (b) for work in connection with the provision of such services otherwise than as an employee.

29. In seeking the statistics which were constituent to the full report requested, OFCOM was, therefore, exercising one of its powers in order to fulfill one of its functions. That function being the 'duty of OFCOM to take all such steps as they consider appropriate for promoting equality of opportunity'.

## Consent

30. Section 393(1) of the Communications Act 2003 allows for disclosure of information falling within the scope of the prohibition where the consent of the business to which the information relates has been given. The Commissioner has established that this consent had not been provided at the time the request was received. During the course of his investigation he has considered: (i) whether OFCOM had a duty under the Act to seek this consent so that the information could be disclosed and, (ii) whether consent is actually required.
31. With regard to (i), the Commissioner put it to OFCOM that, given the Act's assumption in favour of disclosure<sup>1</sup>, whether it considered seeking the consent of the businesses (licencees in this instance) in question in order that the information could be disclosed.
32. OFCOM confirmed that it did consider seeking consent. However, given the resource intensive nature of such a pursuit and the likelihood (from previous experience of contact with the relevant parties) that consent, even if forthcoming, would be likely to be conditional, it decided not to undertake this course of action.<sup>2</sup>
33. In any event, OFCOM has argued that the Act does not oblige them to seek consent. In support of this position OFCOM has made reference to a decision notice issued by the Commissioner which, in their view, adjudicated upon a similarly constructed statutory prohibition<sup>3</sup>. In this case, the prohibition was provided by section 348 of the Financial Services and Markets Act 2000. For the public authority in question, this establishes a prohibition on the disclosure of information received from certain parties unless their consent has been given. The Commissioner's investigation established that, in this instance, the public authority had not sought consent of the relevant parties (for similar reasons to that provided by OFCOM in the current complaint – namely that consent was

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<sup>1</sup> The short title of the Act being "An Act to make provision for disclosure of information held by public authorities..."

<sup>2</sup> See OFCOM's response to the Commissioner at paragraph 11 above.

<sup>3</sup> ICO case reference FS50069723, viewable on the ICO website here: <http://www.ico.gov.uk/upload/documents/decisionnotices/2005/69723%20dn.pdf>

This decision notice was the subject of an Information Tribunal appeal (case reference: EA/2005/0019) which did not question the Commissioner's view on this matter.



unlikely to be forthcoming) and concluded that it was under no duty to do so under the Act.

34. With regard to (ii), the complainant has argued that consent is not necessary for the information to be disclosed. The argument to be considered has two strands. Firstly, the complainant considers that the precedent set by OFCOM's regulatory predecessor, the ITC, should inform OFCOM's approach to the disclosure of the information, not least because the ITC operated under a similarly drafted statutory provision, namely the Broadcasting Act 1990. Secondly, that the requested information actually falls within the category defined by section 393(2) of the Communications Act 2003 and consent is, therefore, not required for its disclosure. These two strands shall be considered below in turn.

### **Previous approach taken by the ITC**

35. The complainant has provided the Commissioner with copies of correspondence which document the ITC's willingness to make available information of a similar level of detail to that identified in the current complaint.
36. It is the case that the Broadcasting Act 1990 subjected the ITC to similarly qualified prohibitions on the disclosure of information to those provided by the Communications Act 2003, as applicable to OFCOM. The Broadcasting Act 1990 stated that the prohibition "did not apply to a disclosure to facilitate a function of the ITC, Welsh Authority or Radio Authority under that Act". It is therefore apparent that the ITC disclosed the information which is now being withheld by OFCOM under this similarly worded prohibition.
37. Whilst this implicitly demonstrates the ITC's regard for the statutory conditions under which they were operating it is significant that, in the correspondence provided, no explicit position is ever expressed<sup>4</sup>. More importantly for the purposes of this decision notice, this strand of the argument to be considered invites the Commissioner to consider the operation of an organisation who were not subject to the Act and whose activities predated the coming into force of the Act. Whilst the Commissioner accepts that there are analogies to be drawn, the fact that the ITC disclosed the information in question does not necessarily mean that they did so legitimately, nor is it within the Commissioner's remit to consider this beyond being mindful of a possible interpretation of the statutory prohibition contained within the Communications Act 2003 which it presents.

### **Does OFCOM have the discretion to disclose the information? Was OFCOM's decision a 'reasonable' or 'appropriate' one?**

38. The second strand of the complainant's argument advocates a reinterpretation of the information requested with the effect that disclosure does not engage the statutory prohibition. The information reconsidered in this alternative light can,

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<sup>4</sup> The ITC does not, for example, state that it undertook to gain the consent of the parties who provided the information in question. It is possible that this is because the ITC considered that the information fell into the category of information not subject to a prohibition. It is not within the Commissioner's remit to hypothesize about this although the substantive issue is addressed later, when the second strand of the complainant's argument is considered.

according to the argument proposed, be disclosed without the prior consent of the contributing licencees.

39. The complainant's argument runs thus:
- (i) OFCOM has a statutory duty under section 337(1) of the Communications Act 2003 to impose conditions on license holders for the purpose of promoting (in relation to employment ) equality of opportunity.
  - (ii) The statutory bar in section 393(1) does not apply to anything which OFCOM does for the purpose of facilitating any of OFCOM's functions.
  - (iii) Since the imposition of conditions referred to in (i) is a statutory function of OFCOM, as is the related duty to take such steps as they consider appropriate to promote equality of opportunity (set out in section 27 of the Communications Act 2003), OFCOM can publish information which facilitates that function without falling foul of the statutory bar. In particular, OFCOM can describe the steps which license holders have taken to comply with the equal opportunity conditions imposed by OFCOM and the monitoring results they have provided to OFCOM. These would be disclosures made for the purpose of OFCOM's statutory functions to promote equal opportunity and, as they are not prohibited by section 393(1), can be disclosed without the consent of the persons/licencees involved.
40. The basis for this reinterpretation of the information or, more accurately, interpretation of *the purpose for which the information is held*, is provided by section 393(2) of the Communications Act 2003 which sets out a number of instances where the statutory prohibition does not apply. The relevant subsection here is section 393(2)(a) which states that:
- “Subsection (1) does not apply to any disclosure of information which is made—
- (a) for the purpose of facilitating the carrying out by OFCOM of any of their functions;”
41. In taking account of the complainant's argument, the Commissioner is mindful of the views of the Information Tribunal in *John Hoyte v The Information Commissioner and the Civil Aviation Authority* [EA/2007/0101]. In this case the Civil Aviation Authority (CAA) relied upon section 44 of the Act to withhold information which it considered to be subject to a statutory bar provided by section 23 of the Civil Aviation Act 1982. However, at paragraph 52 of the decision, the Tribunal asked the question: “In so far as any exception provided the CAA with discretion to disclose the disputed information, was the decision not to exercise that discretion irrational or otherwise unlawful?”. The Tribunal went

onto to say that the “Wednesbury test of unreasonableness, irrationality or perversity” should be adopted to address this question.

42. The Commissioner therefore adopted the Tribunal’s approach to the circumstances of this case, specifically the capacity of the public authority to exercise its discretion over whether to release the information and the reasonableness of its decision in respect of the Wednesbury test. With this in mind the Commissioner took into account the following facts in this case:
  - the fact that OFCOM did not explain why disclosure of the withheld information would not serve its functions in respect of promoting equality of opportunity
  - the content of OFCOM’s letter to broadcasters of 2 October 2007, especially in relation to OFCOM’s own views about the benefits of disclosing this information
43. However, the Commissioner concluded that the Communications Act 2003 does not provide OFCOM with the discretion to disclose the withheld information, and to this extent an interpretation of the Civil Aviation legislation is not analogous. In the Hoyte case, Regulation 9 of the Civil Aviation Regulations 1991 gave the public authority an unambiguous discretion not to disclose information "if it is satisfied that to do so will not further the safety of civil aviation". By contrast, properly analysed, section 393(2)(a) of the Communications Act 2003 does not provide OFCOM with a discretion at all. Instead it provides that in certain circumstances the statutory bar on disclosure set out in section 393(1) of the 2003 Act will not apply. Thus either those circumstances exist or they do not; it is not a matter for OFCOM's discretion.
44. OFCOM can only disclose the information if it would facilitate the carrying out of its functions. This is one step removed from, and narrower than, the concept of ‘discretion’. In other words, if disclosure of the information would not facilitate OFCOM’s functions, then it cannot exercise any discretion as to whether it should be released.
45. In terms of the reasonableness or appropriateness of OFCOM's view that the disclosure of the requested information would not serve its functions in respect of the promotion of equal opportunities in broadcasting, at paragraph 67 of the Hoyte decision the Tribunal interpreted the application the Wednesbury test as: “did the CAA exercise its discretion in a way so unreasonable that no reasonable public authority could have exercised it that way, did it take into account irrelevant considerations or fail to take into account relevant considerations, or was the decision otherwise unlawful or irrational?”
46. Although it has been established that OFCOM does not have the discretion to disclose the requested information the Commissioner has, however, adopted the Tribunal’s Wednesbury test of reasonableness. That is to say whether OFCOM should in fact have considered it appropriate to disclose the information in pursuance of its functions with regard to section 27(2) of the Communications Act 2003.

47. The interpretation of an “irrational” decision was provided by Lord Steven in *Boddington v British Transport Police* [1999] 2 AC 143, 175H. He referred to an irrational decision as being outside “the range of reasonable responses open to a decision maker”. This case established that it is still not open to the courts to ‘step into the shoes’ of the decision maker. Rather a wide degree of latitude needs to be given to the decision taken by the public authority. The Commissioner believes that it is appropriate to also adopt this approach, and in the circumstances of this case it means that it is not the role of the Commissioner to determine how, exactly, OFCOM should fulfil its responsibilities.
48. Rather the Commissioner can only assess whether the withheld information should be disclosed in order to fulfil OFCOM’s responsibilities if the decision to withhold it is blatantly irrational and not one that a reasonable person could have made. The Commissioner has concluded that OFCOM’s decision to withhold the information, as set out above, is within the range of reasonable responses open to it as a regulator. The Commissioner has reached this conclusion for the following reasons:
49. Whilst the Commissioner acknowledges the intent of the argument presented by the complainant he is not persuaded by it, principally because he considers that it erroneously conflates sections of the Communications Act 2003. It has been established above why the information specified in the request was gathered and held by OFCOM (in exercise of its power and in order to assist it in the carrying out of its functions). The obtaining of this information enables OFCOM to establish whether the businesses involved are complying with the conditions of their licences. This places the information within the scope of the prohibition at section 393(1) of the Communications Act 2003.
50. However, in identifying information “gathered” by OFCOM with information “disclosed” the complainant’s argument merges sub-sections 393(1) and 393(2) of the Communications Act 2003. The complainant’s conclusion reached is based upon the false second premise that the information gathered by OFCOM in this instance is intended for disclosure in order to facilitate a function. If the Commissioner were to accept this conclusion he would have to accept the general principal that any information gathered by OFCOM from particular businesses could be disclosed since (thus defined) in any instance, the act of disclosure facilitates the carrying out of OFCOM’s functions. It is, of course, possible that in some instances the disclosure of information gathered by OFCOM might facilitate the carrying out of one of its functions but, in this case, OFCOM has clearly decided that this is not applicable. Disclosure, therefore, would be for the purpose of complying with a Freedom of Information request which would not be a disclosure for the purpose of facilitating one of OFCOM’s functions. Section 393(2), therefore, does not apply and the information is exempt under the statutory prohibition set out under section 393(1)<sup>5</sup>.

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<sup>5</sup> The argument also fails on logical grounds since disclosure of the statistics is neither a necessary nor sufficient condition for OFCOM to facilitate the carrying out of its functions. If the statistics are not disclosed by OFCOM, it does not follow that the facilitation of the carrying out of OFCOM’s functions does not happen (necessary condition). Similarly, the disclosure of the statistics requested does not alone guarantee that the carrying out of OFCOM’s functions will have been facilitated (sufficient condition). When subjected to logical analysis, therefore, the argument fails.

51. In conclusion, therefore, the Commissioner is satisfied that section 393 of the Communications Act 2003 acts as a statutory bar on the disclosure of the requested information in this case and consequently that section 44(1)(a) of the Act is engaged.

## **The Decision**

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52. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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53. The Commissioner requires no steps to be taken.

## **Other Matters**

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54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
55. OFCOM asserts in its internal review response to the complainant and its letter to the Managing Directors of all broadcasters it regulates dated 2 Oct 2007, that it is prevented from disclosing the withheld information by the FOI Act. In addition, OFCOM's internal review decision also suggests that one of the differences between OFCOM and the ITC's functions is that ITC was not subject to the Act's obligations which prohibits OFCOM from disclosing the information requested.
56. This constitutes a fundamental misunderstanding as there is not a requirement under the Act to apply an exemption; in fact there is an assumption in favour of disclosure. Legislative prohibitions on disclosure are provided by other enactments and not the Act itself; section 44 of the Act allows for these prohibitions to be imposed in response to FOI requests. In this case it is the Communications Act 2003 which acts as a prohibition on disclosure.
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## Right of Appeal

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57. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 22<sup>nd</sup> day of July 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Freedom of Information Act 2000

**Section 44(1)** provides that -

“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,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

### Communications Act 2003

**Section 393** provides that -

“(1) Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by—

- (a) this Act,
- (b) the enactments relating to the management of the radio spectrum (so far as not contained in this Act),
- (c) the 1990 Act, or
- (d) the 1996 Act,

is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.

(2) Subsection (1) does not apply to any disclosure of information which is made—

- (a) for the purpose of facilitating the carrying out by OFCOM of any of their functions;
- (b) for the purpose of facilitating the carrying out by any relevant person of any relevant function;
- (c) for the purpose of facilitating the carrying out by the Comptroller and Auditor General of any of his functions;
- (d) for any of the purposes specified in section 17(2)(a) to (d) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (criminal proceedings and investigations);
- (e) for the purpose of any civil proceedings brought under or by virtue of this Act or any of the enactments or instruments mentioned in subsection (5); or
- (f) for the purpose of securing compliance with an international obligation of the United Kingdom.”