

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 June 2010**

**Public Authority:** Channel Four Television Corporation  
**Address:** 124 Horseferry Road  
London  
SW1P 2TX

### Summary

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The complainant requested information in relation to the public authority's decision to air the E4 channel on Freeview platforms especially given the fact that the channel continued to be available for some time afterwards on a subscription only basis on Sky. The public authority declined the requests on the basis of the exemptions at sections 41 (confidential information) and 43(2) (commercial interests) and during the course of the Commissioner's investigation argued that the requests were vexatious in accordance with the provisions of section 14(1).

The Commissioner decided that the requests were not vexatious within the meaning of section 14(1) of the Act. He also found that some of the withheld information had been correctly withheld on the basis of sections 41 and 43(2) but the remainder should have been disclosed because the exemptions did not apply. Consequently, he found the public authority in breach of sections 1(1)(b) (Right of access to information held by public authorities) and section 10(1) (Time for compliance with requests). He additionally found the public authority in breach of sections 17(1)(b) and 17(3) (Refusal of request).

### Background

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1. E4, a digital channel owned by the public authority was launched as a subscription channel on 18 January 2001. On 16 December 2004 the public authority announced that the channel would be available on digital terrestrial television. However, due to its contractual obligations

with BSkyB, it only became a free-to-air channel for Sky subscribers on 06 May 2008.

## The Commissioner's Role

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2. 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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3. On 20 March 2008 the complainant requested the following information:

'(T)he contents of correspondence from Channel 4 and minutes of meetings regarding the availability of E4 via the sky satellite of Freeview..' and

'(T)he contents of correspondence and agreements from Channel 4 with Sky on the subject of E4'

4. It is unclear when the public authority responded to the above requests as the copy of the refusal notice provided to the Commissioner by the complainant is undated. However, the public authority's reason for refusing to disclose the information was summarised as follows;

'The key issues in connection with the availability of E4 on the Sky platform are set out in our E4 channel distribution agreement with Sky. This is subject to a confidentiality provision and therefore any information in this regard is, unfortunately exempt under section 41 of the Act.'

5. On 23 April 2008 the complainant wrote back requesting a review of the public authority's decision.
6. On 10 June 2008 the public wrote back with details of the outcome of the internal review. The public authority upheld the application of section 41 and additionally relied on 'section 43' of the Act to withhold the information requested.

## The Investigation

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### Scope of the case

7. On 02 July 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In summary, the complainant asked the Commissioner to consider whether all of the information requested had been correctly withheld by the public authority.
8. The Commissioner's investigation therefore set out to determine whether all of the information held pursuant to the complainant's requests had been correctly withheld on the basis of the exemptions at sections 41 and 43 of the Act. However, following correspondence with the public authority (details of which are outlined in the paragraphs below), the Commissioner first set out to determine whether the requests were vexatious within the meaning of section 14 of the Act.

### Chronology

9. On 03 June 2009 the Commissioner wrote to the public authority. Regrettably, due to a backlog of cases, the case had not been allocated to a case officer at the time. The Commissioner advised the public authority to once again review the requests and make any further representations in addition to the explanations provided to the complainant in the refusal notice and the letter containing details of the outcome of the internal review. The Commissioner also asked for copies of the withheld information to be prepared and sent to his office.
10. On 20 July 2009 the public authority responded. The public authority provided a detailed explanation of the background of the requests and invited the Commissioner to make a ruling on the application of section 14 because it considered the complainant's requests vexatious.
11. However, notwithstanding its subsequent reliance on section 14, the public authority provided the Commissioner with a schedule of documents containing the information held and additional representations as to why it considered the exemptions at sections 41 and 43 had been correctly applied to them.
12. On 21 September 2009, after the complaint had been allocated to a case officer, the Commissioner wrote to the complainant outlining the scope of the investigation and invited the complainant to comment if necessary.

13. On 25 September 2009 the complainant responded. He did not express any disagreement with the scope of the investigation but reiterated that the public authority should not have adopted a blanket approach to the application of sections 41 and 43 to the information held and should have instead gone through each document to determine if information could be disclosed.
14. On 08 October 2009 the Commissioner wrote to the public authority. The Commissioner explained that he did not consider the requests vexatious and with a view to an informal resolution of that aspect of the complainant, he proceeded to invite the public authority to withdraw the application of section 14.
15. The Commissioner also asked the public authority to provide him with copies of the withheld information and respond to a number of specific queries (details of which are outlined in the 'analysis' section below) in relation to the application of sections 41 and 43.
16. On 23 October 2009 the public authority responded. In summary, it invited the Commissioner to issue a formal decision regarding the application of section 14. Nevertheless, the public authority responded to the Commissioner's queries in relation to the application of the exemptions at sections 41 and 43 but declined to provide copies of the withheld information.
17. On 02 November 2009 the Commissioner wrote back to the public authority. He reiterated that the public authority needed to provide him with copies of the withheld information to enable him to reach a decision on the application of sections 41 and 43. The Commissioner also explained that, in the circumstances of this case, he did not consider it pragmatic to merely issue a decision notice solely on the application of section 14. In taking this approach, he noted the public authority's submissions regarding section 14 which it had applied late and the fact that it also maintained that sections 41 and 43 in any event applied in the alternative. In deciding to address sections 14, 41 and 43 in the decision notices, the Commissioner also took into account the fact that this would not remove the public authority's right of appeal against any of his findings.
18. On 26 November 2009 the public authority responded. The public authority explained that in its view, the Commissioner could reach a decision on the application of exemptions without recourse to all of the withheld information. Nevertheless, the public authority provided the Commissioner with 'a sample of the information requested'. The following information was provided:

- Excerpts from the commercial distribution agreement between Channel 4 and Sky dated 09 June 2004 regarding the distribution fees (3 pages of the agreement were provided).
  - Part of the minutes of a meeting of the Channel Four Corporation Board dated 25 April 2005.
19. On 13 January 2010, following an exchange of correspondence in a related complaint which is not the subject of this notice, the Commissioner invited the public authority to consider making representations as to whether the complainant's requests fell outside the scope of the Act. This was in view of the High Court's<sup>1</sup> interpretation of the derogation provision in schedule 1, part VI of the Act.
20. However, the Commissioner reiterated that he would still need to consider all of the withheld information in order to reach a decision even if the public authority did opt to rely upon the derogation. He therefore asked the public authority once again to provide him with copies of all of the withheld information.
21. On 20 January 2010 the public authority responded. It explained that its primary position was that the requests were vexatious, and the withheld information was in any event correctly exempt on the basis of the exemptions at sections 41 and 43 of the Act. The public authority however declined to provide the Commissioner with copies of the withheld information. It also declined to claim the derogation in relation to the requests that are the subject of this decision notice.
22. On 10 February 2010 the Commissioner issued an information notice requiring the withheld information to be provided to him in accordance with his powers under section 51 of the Act.
23. On 04 March 2010 the public authority complied with the information notice and supplied all of the withheld information to the Commissioner.

## Analysis

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24. A full text of the exemptions referred to below can be found in the legal annex to this notice

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<sup>1</sup> In The BBC cases; BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin) and BBC v The Information Commissioner [2009] EWHC 2348 (Admin).

## Substantive Procedural Matters

25. It is at the Commissioner's discretion to accept any exemption(s) and/or any other relevant provision(s) of the Act which is first relied on by a public authority after a complaint has made to his office. The Commissioner will decide whether to accept a late claim based on the circumstances of each case as well as the nature of the exemption and/or provision relied on. This point was recently revisited in detail in the decision handed down by the Information Tribunal (Tribunal) in *Crown Prosecution Service v Information Tribunal (EA/2009/0077)* at paragraphs 15 – 28. In summary, the Tribunal reiterated the position established by previous Tribunals that neither the Commissioner nor the Tribunal was under an obligation to accept the claiming of late exemptions.
26. The Commissioner has however decided, in the circumstances of this case, where the public authority has claimed that the request is vexatious because it has no serious purpose and to respond would involve an unreasonable use of its resources, to consider the public authority's late reliance on section 14(1). However he does wish to clarify that in doing so he will only consider whether the request could have been refused on the basis of section 14(1) at the time it was received and will only take into account evidence that was available at that point.

## Section 14(1)

27. A public authority is not obliged to comply with a request for information if the request is vexatious. The Act does not define 'vexatious' but in the Commissioner's opinion, the term should be accorded its ordinary meaning so that the key question would be whether the request is likely to cause unjustified distress, disruption or irritation.
28. As explained in the Commissioner's awareness guidance on the application of section 14<sup>2</sup>, in order to determine whether a request is vexatious, the Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors:
  - Whether compliance would create a significant burden in terms of expense **and** distraction

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<sup>2</sup> Available at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/vexatious\\_and\\_repeated\\_requests.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/vexatious_and_repeated_requests.pdf)

- Whether the request is designed to cause disruption or annoyance
  - Whether the request has the effect of harassing the public authority or its staff
  - Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable
  - Whether the request has any serious purpose or value
29. The public authority explained that the complainant had on March 13 2008 originally requested the full contents of the last five substantive responses by the public authority to requests it had received under the Act before 27 February 2008. It was from the information subsequently disclosed by the public authority that the complainant then made the above requests (identical to those made by a previous requestor).
30. In his letter of 20 March 2008, the complainant chose to explain (requesters are generally not obliged to provide reasons for making requests under the Act) that he had requested the same information 'partly (because) I want to find out, for legitimate reasons, whether you will give the same response to my request as that given to the previous request'.
31. The public authority therefore argued that the complainant had made the requests simply to conduct some form of audit of the public authority's Freedom of Information (FOI) processes. According to the public authority, the requests were made 'without any personal interest in the matter and designed to provoke'.
32. Furthermore, the public authority argued that the history of the requests 'demonstrate.....a high degree of obsessive behaviour, in purporting to firstly, "test" Channel 4's accountability by asking for the last 5 substantive responses, and then repeating one of the requests apparently for the same purpose. The public authority concluded that there was no genuine interest in the subject matter at all, and the requests therefore lacked any serious purpose and value.
33. It is important to point out from the outset that under the Act, it is the request (rather than the requestor) that could be deemed vexatious. However, in view of the need to consider the context and history of a request before reaching a determination on the application of section 14, the Tribunal in *Welsh v Information Commissioner (EA/2007/0088)* pointed out that; 'it is possible for a request to be valid if made by one person, but vexatious if made by another, valid if made to one person, vexatious if made to another...' (paragraph 21). In other words, the identity of particular applicants could become relevant if they had previously requested information under the Act.



Whether the requests are designed to cause disruption or annoyance

34. In the public authority's view the requests were made because the complainant wanted to audit the public authority's FOI process. For that reason therefore, the public authority considers the requests were made without an interest in the subject matter and merely designed to provoke.
35. The Commissioner notes that the complainant did point out that he made the requests 'partly' because he wanted to find out if he would receive a similar response from the public authority. The Commissioner concedes that this is an unusual reason for an applicant to request information. The interest usually is in the information requested itself rather than in the consistency of the public authority's responses.
36. The Commissioner would like to make it clear that he has been empowered by Parliament to, among other things, monitor public authorities' compliance or otherwise with the Act. Where a member of the public has concerns about a public authority's non-compliance with the Act then they are able to complain to the Commissioner. There is no provision in the Act which permits members of the public to conduct an audit of public authorities' FOI processes.
37. Nevertheless, the Commissioner is not persuaded that the requests were designed to cause disruption or annoyance for two reasons. Firstly, it is clear that the complainant did not make the requests solely to find out what the public authority's response would be. Secondly, since the previous request was made in July 2007 (and the requested information was not disclosed), it seems reasonable that in March 2008, an applicant interested in the same information could well have expected to receive some or all of the information requested because of a change in the circumstances at the time of the request. There is no doubt that the words used by the complainant (coupled with the fact the requests were only made as a result of the information provided following a previous request) did not enhance his position. However, it is highly likely that there are other applicants who have requested information which they are aware (following an earlier request) had been previously denied applicants under the Act. To suggest that an applicant who requests information in this way intends to cause disruption or annoyance is by no means obvious. Where there are cost implications to consider, then section 12 of the Act (exemption where cost of compliance exceeds appropriate limit) provides a potential outlet for public authorities.



Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable

38. Having carefully considered the context and history of the complainant's requests to the public authority and the particular circumstances of this case, the Commissioner is not persuaded that the requests 'demonstrate.....a high degree of obsessive behaviour...' in purporting to test the public authority's accountability.
39. In most of the cases in which both the Tribunal and the Commissioner have had to consider obsessive behaviour as part of a vexatious claim, there is usually a total unwillingness by the complainant to engage with a contrary viewpoint even in the face of independent findings which also disagree with the applicant. For instance, in the Welsh case, the Tribunal noted;
- '...Mr Welsh simply ignores the results of 3 separate clinical investigations into his allegation. He advances no medical evidence of his own to challenge their findings.....that unwillingness to accept or engage with contrary evidence is an indicator of someone obsessed with his particular viewpoint, to the exclusion of any other...it is the persistence of Mr Welsh's complaints, in the teeth of the findings of independent and external investigations, that makes this request, against that background and context, vexatious....' (Paragraphs 24 & 25).
40. In such cases, more often than not, a response to a request generates a further request and so on. The situation could gradually degenerate into one in which the applicant then uses the Act as a forum to question the authenticity of information supplied (because it is not the information they would have expected to receive) rather than simply as a medium to request and possibly receive information held by public authorities.
41. As far as the Commissioner is aware, in relation to this specific case, the complainant made a request on 13 March 2008 and subsequently made another on 28 March 2008. The public authority argues that the nature of the requests suggest a degree of obsession with testing the public authority's accountability under FOI. Firstly, as noted above, the Commissioner is not persuaded that the complainant made the requests solely to test the public authority's accountability. Secondly, and perhaps more importantly, the number of requests does not, in the Commissioner's view, demonstrate an obsessive pattern of behaviour.
42. The public authority however also referred the Commissioner to the decisions handed down by the Tribunal in *Hossack v Department for*

Work and Pensions (EA/2007/0024) and the Welsh case. According to the Tribunal in Hossack;

'the consequences of finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in these other contexts, and therefore the threshold for a request to be found vexatious need not be set too high' (paragraph 11).

43. The Tribunal in Welsh case further commented;

'...there is a danger that setting the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested....' (paragraph 26).

44. The Commissioner does not disagree with the Tribunal's comments and he has in fact amended his awareness guidance accordingly. However, there is also a converse public interest in ensuring that the standard is not set too low. In both cases referred to above, there was clearly an ongoing obsession with a particular point of view which was evidenced by the number of times the relevant public authorities had to respond to FOI requests from the applicants. The Commissioner is not persuaded that parallels can be drawn between the present case and the Hossack and Welsh cases. The number of requests made by the complainant in this case could hardly be described as evidence of an obsession with a particular point of view or topic. The complainant did not explicitly indicate that his sole purpose was to test the public authority's accountability. In the Commissioner's view, it would amount to setting the standard too low to permit public authorities to categorise a request as vexatious merely on the basis of inconclusive evidence regarding the motive of an applicant. The number of requests made does not lend itself to the conclusion that the complainant had an obsession with testing or monitoring the accountability of the public authority's FOI process.

Whether the request has any serious purpose or value

45. Again, the thrust of the public authority's argument on this point is that because the complainant wanted to test the accountability of its FOI process, a role which is clearly within the Commissioner's remit, the requests lacked any serious purpose or value.

46. The Commissioner considers that after a reasonable interval has elapsed, applicants should be able to request information which was previously not disclosed to them or other applicants. The passage of time could be a crucial determinant in the decision to either disclose or not disclose requested information. Therefore, in the Commissioner's view, there is a serious purpose to a request which apart from the requested information, also seeks to find out whether a public authority is willing to disclose information it had previously refused to disclose under the Act. If it would be unwilling to disclose the information anytime soon because circumstances are not likely to change significantly or alter the applicability of the exemptions claimed and it did not wish to rely on provisions such as section 14 in relation to particular requests, the public authority could publish a standard response and refer dissatisfied complainants to the Commissioner's office.
47. Therefore, in light of the context and history of the requests and the lack of sufficient evidence to substantiate claims that the requests were designed to be disruptive, demonstrated a pattern of obsessiveness or lacked any serious purpose, the Commissioner finds that the requests were not vexatious within the meaning of section 14(1) of the Act.

## Exemptions

48. A summary of the Commissioner's decision in respect of the application of the exemptions to each aspect of the withheld information can be found in Annex A to this notice.
49. In the Commissioner's letter of 08 October 2008, he asked the public authority to review its handling of the requests considering its application of each exemption to the withheld *information* as opposed to a blanket application of an exemption to *documents*. For instance, in the case of the withheld agreements, the Commissioner explained that the public authority needed to consider the applicability or otherwise of the exemption to each term/clause within the agreement.
50. In response, the public authority claimed;
- '.....(t)he request that confidential commercial information should be supplied to the Information Commissioner cross-referenced with each exemption applying to each term or clause of the agreement with detailed explanations for each term or clause in the agreement as to why they are exempt from disclosure is of itself disproportionate. We do not think that this sort of information requires any serious evaluation by the Information Commissioner as it should be

immediately apparent from its nature that it falls squarely within this section.'

51. The Commissioner disagrees with this view. It is well established that a request under the Act is for 'information' rather than 'documents' so that in some cases, the disclosure of a summary of the information in a document rather than the actual document itself would be enough to satisfy a request. In the same vein, under the Act, public authorities are expected to apply exemptions to the information within documents rather than to the documents themselves so that an exemption could apply to some, but not all, of the information contained in a document.
52. The above approach has been endorsed by the Tribunal. For instance in *Financial Services Authority v The Information Commissioner & Riverstone Managing Agency (EA/2008/0047)*, the Tribunal commented;  
  
'.....in so far as the information in question can be divided up, the Commissioner was obliged to consider each piece of information and apply section 43 and the public interest test to it and the Tribunal must accordingly adopt the same approach when considering the appeal.  
'(Paragraph 17).
53. Furthermore, unless plainly obvious as in some cases involving requests for information which constitute personal data, the Commissioner's decision on the applicability or otherwise of exemptions to withheld information would not be based on the apparent nature of the information. Instead, the information has to be carefully evaluated alongside the public authority's submissions and other public interest considerations (if applicable) before a decision is made.
54. In the Commissioner's assessment therefore, he has considered the information in each of the documents identified by the public authority as containing the withheld information. Given that the public authority refused to provide him with specific submissions in relation to the application of exemptions to each part of the information withheld, the Commissioner applied the public authority's generic arguments to specific withheld information and reached a decision on that basis.

## **Section 41**

55. As explained earlier, following the requests, the public authority explained to the complainant that;

'The key issues in connection with the availability of E4 on the Sky platform are set out in our E4 channel distribution agreement with Sky. This is subject to a confidentiality provision and therefore any information in this regard, is unfortunately, exempt under section 41 of the Act.'

56. Information is exempt on the basis of section 41 if it was obtained by the public authority from any other person and the disclosure of the information by the public authority holding it would constitute an actionable breach of confidence.
57. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party (A to B criteria) **and** the disclosure of that information has to constitute an actionable breach of confidence.

#### Information obtained from another person

58. In deciding whether information has been obtained from any other person the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.
59. The public authority confirmed that the documents listed below contain the information which it withheld on the basis of section 41.
60. **Document 1** – digital distribution agreement between Sky and the public authority dated 9 June 2004
61. **Document 4** – email exchanges between the public authority and Sky from 20-26 April 2005
62. **Document 6** – email exchange between Sky and the public authority from 27-28 April 2005
63. **Document 7** – deed of amendment for digital DTH distribution of E4 and More 4 between Sky and the public authority (unsigned) dated 20 December 2007
64. **Document 8** – deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures Limited dated 31 January 2008
65. **Document 9** – deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures dated 29 April 2008.

66. The Commissioner has considered the information in each document to determine whether or not section 41 was correctly engaged.
67. In the Commissioner's view, a written agreement between two parties is not caught by the exemption at section 41 because it does not constitute information provided by one party to the other. This view was supported by the Tribunal in *Derry City Council v Information Commissioner* (EA/2006/0014) at paragraphs 32 (a) & (c).
68. A contractual agreement is a record of the mutual obligations of the parties and for that reason it would not satisfy the first requirement of the exemption which states that the information in question must have been obtained from a third party. The information in documents 1, 8 and 9 therefore would not constitute information which was obtained by the public authority from Sky. The information constitutes an expression of their mutual obligations in contractual terms.
69. The Commissioner therefore finds that the information in documents 1 (other than the information on page 39 of the agreement), 8 and 9 was incorrectly withheld on the basis of section 41 because it does not constitute information which was obtained from another party.
70. Page 39 of document 1 is a schedule of technical specifications which it seems clear could have only been provided by Sky to the public authority rather than being jointly created and agreed. The Commissioner therefore finds that this information meets the A to B criteria.
71. Similarly, although the agreement marked document 7 was unsigned, the Commissioner is of the view that it does not satisfy the A to B criteria because it was clearly jointly created by both parties.
72. The Commissioner next considered whether the information in documents 4 and 6 meet the A to B criteria (i.e. information obtained by the public authority from a third party).
73. In terms of document 4, the Commissioner notes that the first email in the chain was sent on behalf of the public authority to Sky. However, he also notes that the information in the fourth, fifth (in context) and ninth paragraphs of the email was provided to the public authority by Sky. The Commissioner therefore finds that other than the information in the fourth, fifth, and ninth paragraph of the email, the remainder of the information does not meet the A to B criteria and was therefore incorrectly withheld on the basis of section 41.

74. In terms of the second and third email in the chain, the Commissioner notes that the second was sent on behalf of Sky and expresses the corporation's views about its options regarding the proposed move by the public authority to turn E4 into a free to view channel. The Commissioner is satisfied that the information therein was provided by Sky and therefore meets the A to B criteria. The third email is a direct response by the public authority to Sky's email and the Commissioner has considered it within that context. Therefore, although it contains some of the public authority's views, it primarily covers the points expressed by Sky in the second email. The Commissioner is therefore satisfied that in the context in which it was produced, the third email also meets the A to B criteria.
75. The last email which was sent internally (by a member of staff of the public authority) forwards the second and third email to a number of senior staff. In light of the context in which it was sent as well as the inclusion of the forwarded messages, the Commissioner is satisfied that it also meets the A to B criteria. In summary, this chain of emails primarily contains information provided by Sky to the public authority.
76. In terms of document 6, the Commissioner notes that the originating email in the chain was sent on behalf of the public authority to Sky and does not appear to contain any information which was obtained by the public authority from Sky. The Commissioner is therefore satisfied that the originating email does not meet the A to B criteria.
77. The second email, which is basically Sky's response, clearly meets the A to B criteria. The last email in the chain was sent internally (by a member of staff of the public authority) and forwards Sky's response to a number of senior staff. Therefore, for the same reasons as above in relation to document 4, the Commissioner is satisfied that it meets the A to B criteria.
78. In summary, the Commissioner finds that the following information meets the information A to B criteria:
- Paragraph 39 of document 1
  - The fourth, fifth, and ninth paragraphs of the first email in the chain and the remainder of the emails in the chain in document 4
  - The second and last emails in the chain in document 6.



### Actionable breach of confidence

79. The Commissioner next considered whether the disclosure of the information identified above would have constituted an actionable breach of confidence.
80. The case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415* is the most commonly cited case in relation to the constituent elements for an 'actionable breach of confidence' in relation to information of a commercial nature. In delivering judgement, Megarry J noted that the three elements required for a breach of confidence to be successful are;
- the information has the necessary quality of confidence;
  - the information was imparted in circumstances importing an obligation of confidence; and
  - there was an unauthorised use of the information to the detriment of the confider.
81. The Commissioner has also adopted the above three stage test when considering whether information of a commercial nature, which is relevant to the information in this case, meets the criteria above.
82. The Commissioner is not persuaded that the disclosure of the second and last emails in the chain of emails marked document 6 would have constituted an actionable breach of confidence. In the Commissioner's opinion, the information is quite trivial and, in the context of commercial information, does not therefore possess the necessary quality of confidence. The Commissioner is also not persuaded that the confider would have expected this specific piece of information to be held in confidence as it does not, in the Commissioner's view, reveal anything which could reasonably be described as confidential. For the same reason, the Commissioner is not persuaded that the disclosure of the information would have been detrimental to Sky.
83. The Commissioner therefore finds that the remainder of the information in the first email in the chain marked document 4 and the second and last emails in the chain marked document 6 was incorrectly withheld on the basis of the exemption at section 41 of the Act.
84. The Commissioner considers that the disclosure of the following information would have constituted an actionable breach of confidence for the reasons set out below:
- Document 1 – page 39 only,

- Document 4 – fourth, fifth and ninth paragraphs of the first email in the chain; second, third, and last email. As noted above, the last email needs to be considered in the context it was written.
85. Much of the discussions between Sky and the public authority focussed primarily on the public authority's decision to air E4 on a free to view channel and the resulting impact on their contractual obligations. Discussions of that nature would, in the Commissioner's opinion, possess the necessary quality of confidence because they were not trivial and would not have been accessible to third parties. The Commissioner is also satisfied that Sky would have had reasonable expectations of confidentiality regarding the information provided to the public authority and indeed the discussions relating to contractual obligations regarding the broadcast of the E4 channel. Although, it does not appear such an obligation was explicitly indicated, it would have been implicit in the negotiations given the basis on which they are normally conducted and the commercially sensitive nature of the issue under discussion. In terms of the detrimental effect that disclosure would have had on Sky, the Commissioner is satisfied that the disclosure of information relating to Sky's contractual obligations with the public authority on the distribution of the E4 channel would have been detrimental to Sky within a competitive media environment. Sky's competitors would be able to use information which reveals details of it's negotiations with the public authority to their advantage and to Sky's detriment.

#### The public interest defence

86. Section 41 is an absolute exemption. However, case law on confidentiality suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. Therefore, the Commissioner next considered whether the public authority would have been able to rely on a public interest defence in the event of the disclosure of the relevant information in document 1 (page 39 only) and document 4 (i.e. fourth, fifth, and ninth paragraphs of the first email; second, third, and last emails only).
87. This in effect involves a consideration of whether there is a public interest in disclosing the withheld information notwithstanding the wider public interest in preserving the principle of confidentiality. However, unlike the public interest test applied to qualified exemptions under the Act, the public interest test in deciding if a duty of confidence is actionable is reversed. Therefore, the duty of confidence public interest test assumes that information should be withheld unless

the public interest in disclosure exceeds the public interest in maintaining the confidence.

88. The Commissioner therefore considered whether the public authority would have been able to rely on a public interest defence if the relevant information above in documents 1 and 4 had been disclosed.

Public interest arguments in favour of disclosure

89. The public authority did not present any arguments in favour of overriding the duty of confidentiality owed to Sky.
90. The Commissioner considers that there is a public interest in disclosing the public authority's exchanges with Sky regarding the transfer of E4 to Freeview. Given that both parties still had contractual obligations regarding E4 as a pay channel, disclosure would have informed the public about the basis for the public authority's decision under the circumstances to make the transfer. In view of the fact that the public authority is a public service television broadcaster, there is an inherent public interest in its transparency and accountability. The withheld information would, in the Commissioner's view, enhance the transparency of its contractual relationship with Sky regarding the E4 channel.

Public interest in favour of maintaining the duty of confidentiality (owed to Sky)

91. The public authority argued that, in order not to undermine its commercial interests, third parties with whom it transacts must be able to rely, where appropriate, on negotiations and transactions being carried out in confidence.
92. Generally, the Commissioner considers there is a wider public interest in preserving the principle of confidentiality. Specifically in this case, the Commissioner agrees with the public authority that the disclosure of information which was provided in confidence would undermine the Sky's commercial interests. The information could have been used to weaken Sky's bargaining strength in negotiations with other Channel providers. In the Commissioner's view there is significant public interest in protecting the relationship of trust and confidentiality between the public authority and Sky.
93. The information in question was explicit about Sky's possible options if the public authority decided to go forward with its plans to transfer the E4 channel to Freeview. It also contained technical specification details particular to Sky. It would seem to be the kind of information Sky

would have expected to be covered by the implicit confidential relationship between both parties in respect of the negotiations. In the Commissioner's opinion, there is nothing specific in the information which serves the public interest to the extent that any action for breach of confidence brought by Sky would not on balance succeed.

94. On balance therefore, the Commissioner finds that the public interest in maintaining the duty of confidence owed by the public authority to Sky in respect of the relevant information in documents 1 and 4 outweighed the public interest in disclosure.
95. Consequently, the Commissioner finds that the following information was correctly withheld on the basis of the exemption at section 41
- Document 1 - page 39 only
  - Document 4: the fourth, fifth, and ninth paragraphs of the first email in the chain and the second, third, and last emails

### **Section 43(2)**

96. For ease of reference, the Commissioner has listed below the information the public authority withheld on the basis of the exemption at section 43(2) and which he found was not correctly withheld under section 41. He has therefore gone on to investigate whether section 43(2) was engaged in respect of that information.

**Document 1** - Digital distribution agreement between Sky and the public authority dated 9 June 2004 (excluding the information on page 39 of the agreement).

**Document 2** – A paper presented to the public authority's board regarding the review of its strategy in relation to E4/Free-to-Air dated 19 April 2005.

**Document 3** – Part of the minutes of the public authority's board meeting dated 25 April 2005.

**Document 4** – First email in the chain other than the fourth, fifth, and ninth paragraphs.

**Document 6** – First, second and last emails in the chain.

**Document 7** – Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures Limited dated 20 December 2007.

**Document 8** – Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures Limited dated 31 January 2008.

**Document 9** - Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures dated 29 April 2008.

97. Information is exempt on the basis of section 43(2) if its disclosure under the Act would, or would be likely to prejudice the commercial interests of any person including the public authority holding it.
98. The public authority explained that the disclosure of the above information would significantly prejudice its commercial interests as it would likely affect its distribution negotiations with other competing platforms. The public authority further argued that if the information had been disclosed, television platforms would not have been able to enter into commercial arrangements with the public authority and remain comfortable in the knowledge that these arrangements would remain confidential. This would consequently prejudice the public authority's ability to negotiate properly with these platforms.
99. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. The underlying motive for these transactions is likely to be profit, but this is not necessarily always the case.
100. As noted above the public authority is a public service television broadcaster. However, although it receives a subsidy in the form of free broadcasting spectrum, it is largely self funding and funds itself like most privately run broadcasters through for instance, the sale of on-air advertising, programme sponsorship etc. The withheld information relates to the distribution of E4 on Freeview. E4 is one of the public authority's commercial channels and was previously only available via subscription on television platforms including Sky. The Commissioner understands that there were commercial reasons for moving E4 to Freeview and in light of the public authority's funding arrangements, he is satisfied that the public authority has a commercial interest in relation to the withheld information.
101. The Commissioner therefore finds that the public authority has a commercial interest (in relation to the withheld information) as envisaged by section 43(2) of the Act.

102. The public authority also argued that the disclosure of the above information would or would be likely to prejudice Sky's commercial interests. According to the public authority, disclosure would result in competitors being able to see sensitive pricing information and subsequently using this information when negotiating similar agreements with Sky in the future or with other parties in the broadcasting industry. The public authority provided the Commissioner with an email from Sky which confirmed Sky's position that the withheld information was commercially sensitive.
103. For the same reasons that he decided the public authority has a commercial interest to protect in relation to the withheld information, the Commissioner is persuaded that Sky also has a commercial interest to protect within the contemplation of section 43(2).

Would or Would be likely to Prejudice

104. In considering the likelihood of prejudice, the Commissioner was guided by the Tribunal's comments in Hogan v the ICO and Oxford City Council (EA/2005/0026 & EA/2005/0030);

'The application of the prejudice test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of prejudice being claimed must be considered.....A third step for the decision-maker concerns the likelihood of occurrence of prejudice.' (Paragraphs 28 to 34).

105. The Commissioner has already found that both the public authority and Sky had commercial interests to protect as envisaged by section 43(2).
106. The public authority argued that in its view (as well as Sky's), the words, 'would, or would be likely to' 'are inclusive and simply indicate in the Act that the test encompasses the lesser position. Both are possible and we adopt both positions..'
107. The Commissioner would certainly agree that more often than not, the lower threshold (i.e. would be likely to) of prejudice would be most applicable because it would be difficult to demonstrate that the disclosure of information would more probably than not result in the prejudice anticipated. Nevertheless, the wording of the Act seems quite clear that the words are not inclusive. The words therefore need to be considered separately as each could result in a different outcome. The Tribunal also appeared to make the same observation in Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026).



108. According to the Tribunal; '....there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interest.....' (Paragraph 36)
109. In any event, in the absence of a clear statement by the public authority as to which of the limbs it adopted, the Tribunal has suggested that the lower level of prejudice should be applied. (McIntyre v The Information Commissioner & The Ministry of Defence – EA/2007/0068 at paragraph 45). The Commissioner has therefore investigated whether the lower level of prejudice applied to the relevant information under section 43(2).
110. The Commissioner agrees with the Tribunal that, 'would be likely to prejudice' means that the possibility of prejudice should be 'real and significant' and certainly more than hypothetical or remote.
111. Generally, the public authority argued that disclosure 'would be very likely' to harm Sky commercially because competitors would be able to see sensitive pricing information and use this to their advantage when negotiating with Sky or other parties in the industry.
112. In terms of the likelihood of prejudice to its commercial interests, the public authority argued that disclosure would likely affect its own negotiations with other competing television platforms. It further argued that disclosure 'may prejudice' the public authority's ability to negotiate properly as television platforms would not be able enter into commercial agreements with the public authority and be comfortable in the knowledge that these arrangements would remain confidential.
113. The Commissioner therefore considered the information in each of the above documents to determine whether the exemption at section 43(2) was correctly applied.

Document 1 - Digital distribution agreement between Sky and the public authority dated 9 June 2004

114. The public authority argued that because the above contract 'sets out among other matters', the fees paid by Sky to its subsidiary, 4 Ventures Limited from 2004 to 2007, disclosure would prejudice its ability to negotiate pay deals with other television platforms. For the



same reasons, disclosure would have been equally prejudicial to Sky's commercial interests.

115. The Commissioner has carefully considered the relevant information in document 1 and finds that the parts of the agreement listed below engaged the exemption at section 43(2) because they relate to pricing information which if disclosed, would have been likely to be disadvantageous to both the public authority and Sky in terms of their bargaining strength when negotiating similar agreements in the future with other parties. As one of the leading TV platforms, it is highly likely that Sky conducts similar negotiations with other broadcasters. In the Commissioner's view therefore, the pricing information would have provided other TV platforms with a general overview of the negotiating strengths of both the public authority and Sky which could then be used by those platforms to the detriment of Sky and the public authority.

Clauses 2.5 - 2.6

Clauses 4.1 – 4.3

Clauses 4.4(c) and 4.4(d)

Clause 4.6

Clause 5.1(b)

Clauses 5.2 – 5.5

Clause 7

Clauses 8.1 – 8.2(i) & 8.2(ii)

Clause 10.14

Clauses 11.1 – 11.2

116. The Commissioner additionally finds that the parts of the agreement listed below engaged the exemption at section 43(2).

Clauses 5.8 – 5.9 and 12.5

117. These parts of the agreement relate to the possible remedies for specific breaches of aspects of the agreement. In the Commissioner's view, the disclosure of this information would have likely weakened the public authority's bargaining position in subsequent negotiations with other parties including other television platforms. Knowledge that the

public authority would be prepared to accept certain consequences for a breach of its contractual obligations could place the public authority in a competitive disadvantage with its competitors and would be likely to prejudice the public authority's commercial interests.

#### Clauses 6.2.2 – 6.12

118. These relate to programme content and the target audience objective. The Commissioner considers that whilst the terms were agreeable to the public authority in its negotiations with Sky, those same terms may not have been necessarily agreeable to the public authority in negotiations with other television platforms. To that extent therefore, the Commissioner finds that disclosure would have likely weakened the public authority's bargaining position in future negotiations and would have been likely to prejudice the public authority's commercial interests. The Commissioner's finding equally applies to Sky because whilst it was willing to agree those specific terms with the public authority, it may not have been willing to do so with another broadcaster.

#### Clauses 9.1 – 9.7

119. These relate to agreed options for both parties in the event that the public authority decided to air the E4 channel on Freeview. For the same reasons, he found clauses 6.22 – 6.12 exempt, the Commissioner finds that the disclosure of the information in these clauses would have been likely to prejudice the public authority's commercial interests.

#### Clauses 13.2.1, 13.3, 13.4, and 13.5 (including 13.5.1 and 13.5.2)

120. The above clauses relate to some of the factors that would have led to the termination of the agreement. These clauses specifically relate to the acceptable level of subscribers needed to avoid termination. Again, because these terms, as it appears, were specific to the agreement between the public authority and Sky, the Commissioner finds that disclosure could have weakened both the public authority's and Sky's future bargaining position and consequently would have been likely to prejudice their commercial interests.

121. The Commissioner however finds that the remainder of the information in document 1 was not exempt on the basis of section 43(2).

122. The parties to the agreement and the definition of certain terms used in the main body of the agreement can be found at pages 1 – 9. The Commissioner is not persuaded that the disclosure of these parts of the

agreement would have been likely to prejudice either the public authority's or Sky's commercial interests. They do not relate to pricing information or information of such a nature that if disclosed, could have weakened the public authority's or Sky's bargaining position.

123. Pages 10, 11 (excluding clause 2.5), and clauses 3 – 3.2 include additional definition of terms, rights granted to Sky under the agreement and the duration of the agreement. For the same reason as above, the Commissioner is not persuaded that disclosure would have been likely to prejudice either the public authority's or Sky's commercial interests.
124. Clauses 4.4(a) – (b) and 4.5 relate to terms surrounding the payment of licence fees and VAT. For the same reason above the Commissioner is not persuaded that this information would have been likely to prejudice the public authority's or Sky's commercial interests.
125. Clauses 4.7 – 4.9.3 and 4.10 – 4.10.3 relate to records and audits. They specifically relate to the length of time records needed to be kept under the terms of the agreement and the public authority's right to audit Sky's books and records relevant to the distribution agreement. The process is clearly described but other than that there is no substantial information regarding the actual nature of the audit. The Commissioner is therefore not persuaded that disclosure would have been likely to prejudice both the public authority's and Sky's commercial interests.

Clauses 5 – 5.1(a), (c), (d), and (e), 5.6 – 5.7, 5.10, 5.11 – 5.14

126. The above clauses relate to how E4 should be broadcast, compliance with legal and regulatory obligations, and recording of programmes. Again, the Commissioner is not persuaded that the disclosure of this information would have revealed pricing information or could have weakened either the public authority's or Sky's future bargaining position.

Clauses 6, 6.1, 6.2, and 6.2.1

127. These parts of the agreement on programme content and delivery do not, in the Commissioner's view, reveal any information of a sensitive nature which would have been likely to prejudice both the public authority's and Sky's commercial interests in the event of disclosure.
128. Clauses 8 – 8.9 relate to the marketing and packaging of E4. In the Commissioner's view, the terms agreed would have been evident to subscribers to E4 on Sky. As far as he can see, all of the information

therein would not have been commercially sensitive and/or would have already been known by most subscribers.

129. Clauses 9, 10, 10.1 – 10.13 relate to terms agreed regarding the interactive part of the E4 channel. The Commissioner is of the view that most of the information in this part of the agreement would have been known to most E4 subscribers on Sky and he is therefore not persuaded that disclosure would have been likely to prejudice the public authority's or Sky's commercial interests. In terms of any information not already known to subscribers, the Commissioner is not persuaded that on its own it would have been commercially sensitive or therefore that section 43 applied.
130. Clauses 11 and 11.1 relate to the replacement of viewing cards. The Commissioner is not persuaded that this information would have been likely to prejudice either the public authority's or Sky's commercial interests. It is not, in the Commissioner's view, commercially sensitive or of a nature which would have weakened the public authority's or Sky's bargaining position.

Clauses 12, 12.1 (a, b, c), 12.2 – 12.4, 12.6 – 12.8

131. The above clauses primarily relate to liabilities and indemnities. Although specific to the E4 distribution agreement, the Commissioner is nonetheless of the view that they are standard liability and indemnity clauses one would expect to find in contractual agreements within the industry. The Commissioner is therefore not persuaded that disclosure would have been likely to prejudice the public authority's commercial interests.

Clauses 13, 13.1 (including 13.1.1, 13.1.2, 13.1.3, 13.1.4, 13.1.5, 13.1.6), 13.2, 13.2.2, 13.6, 13.7, and 13.8

132. As noted, these clauses relate to the termination of the agreement. In the Commissioner's view the above clauses mainly contain standard termination terms and where they appear to be specific with regards some of the terms agreed under the distribution agreement, those terms, in the Commissioner's opinion, would have not have been commercially sensitive. In the Commissioner's opinion, these clauses are not usually central to the negotiation process as opposed to pricing information for instance. Therefore, he is not persuaded that the information in the above clauses would have been likely to prejudice the commercial interests of either the public authority or Sky.
133. Clauses 14, 14.1 – 14.3 relate to warranties and for the same reasons as above, the Commissioner is not persuaded that disclosure would

have been likely to prejudice the public authority's or Sky's commercial interests.

134. Clauses 15, 15.1 – 15.11 mainly cover miscellaneous matters of legal application of the terms of the agreement and for the same reasons as above the Commissioner is not persuaded that disclosure would have been likely to prejudice the public authority's or Sky's commercial interests.
135. The Commissioner also finds that the names of the signatories to the agreement (on page 38) should be disclosed other than the actual signatures which should be redacted. In the Commissioner's opinion, the signatures could be useful to individuals with intentions of defrauding Sky and/or the public authority thereby putting their reputations at risk. To that extent therefore, he finds that the signatures constitute commercially sensitive information and should therefore be withheld.

Document 2 – A paper presented to the public authority's board regarding the review of its strategy in relation to E4/Free-to-Air dated 19 April 2005.

136. The public authority explained that the above document 'includes commercially sensitive information on all distribution agreements (including Sky, NTL, Telewest and Top Up). Reviews Channel 4 operational issues and financial position.'
137. Broadly, the document covers the public authority's strategy including the financial case and assumptions for moving E4 to Freeview. The Commissioner is persuaded that the nature of the information therein would have been useful to the public authority's competitors at the time it was produced. As to the question of whether the information would have still been commercially sensitive at the time of the requests, the Commissioner is of the opinion that the nature of information in the strategy report could have been beneficial to competitors and television platforms in similar negotiations in the future. In the Commissioner's view, the strategy report would have given competitors an overview of the public authority's approach to similar negotiations and could better inform competitors' assumptions regarding the public authority's operational and financial position. The Commissioner is therefore persuaded that disclosure would have been likely to prejudice the public authority's commercial interests.

Document 3 – Part of the minutes of the public authority's board meeting dated 25 April 2005.

138. The relevant part of the minutes relates to discussions regarding the strategy in relation to making E4 available on Freeview. In the Commissioner's opinion, the minutes reveal information relating to the distribution agreement with Sky which at the time of the board meeting could have been prejudicial to the public authority's commercial interests. However, that meeting took place in 2005, 3 years before the complainant's requests were made. At the time of the requests, the events which were being contemplated at the meeting (following the transfer of E4 to Freeview) had occurred. For instance, Freeview viewers were able to receive E4 for free while Sky subscribers were required to pay for it.
139. The Commissioner therefore finds that this information was incorrectly exempt on the basis of section 43(2) as disclosure would not have been likely to prejudice the public authority's commercial interests.

Document 4 – first email in the chain (excluding the fourth, fifth, and ninth paragraphs)

140. The remainder of the information relates to the contractual arrangements/commitments between the public authority and Sky regarding the digital distribution agreement. The email was written in April 2005, 3 years before the requests were made. As opposed to the actual agreement of June 2004 or indeed the deeds of amendments, the email could be construed as containing details about the negotiations. However it does not outline any final decision or agreement on either party's position. Whilst the information relating to pricing as well as the information contained in the strategy document also relates to the negotiations it differs because it would more or less reveal finalised positions. In the Commissioner's view the disclosure of finalised positions would be more likely to prejudice the public authority's and Sky's commercial interests. Having carefully considered the contents of the relevant parts of document 4 outlined above, the Commissioner is not persuaded that disclosure would have been likely to prejudice the public authority's or Sky's commercial interests. The Commissioner is of course aware that in some cases, details of negotiations could remain commercially sensitive after an agreement has been concluded, particularly if it revealed significant and sensitive information any of the parties' tactical approaches to those negotiations. However in this case he does not consider that the relevant information in the first email in the chain marked document 4 would reveal such sensitive or significant tactical details.

Document 6 – first, second and last emails in the chain

141. The Commissioner finds that the disclosure of the information in the above email would not have been likely to prejudice the public authority's or Sky's commercial interests for the same reasons that he found the second email and last emails in the chain not exempt on the basis of section 41. In his view the information can reasonably be described as trivial and not sensitive or confidential. Therefore he is not persuaded that its disclosure would be likely to prejudice the commercial interests of either party.

Documents 7, 8, and 9: (deeds of amendment for digital distribution DTH agreements for E4 and More4 between the public authority and Sky)

142. As suggested, the above agreements (written in letter format) contain specific amendments to the distribution agreement of June 2004 (document 1).

143. The public authority explained that some information on pricing was publicly available but it was not specific regarding the parts of the agreements it considered were publicly available. According to the public authority, the relevant information in respect of pricing was could be obtained at;  
[http://corporate.sky.com/documents/pdf/20c24d2e1c62406594e1a79de5f917db/bskyb\\_and\\_sssl\\_published\\_price\\_list\\_december\\_2006.pdf](http://corporate.sky.com/documents/pdf/20c24d2e1c62406594e1a79de5f917db/bskyb_and_sssl_published_price_list_december_2006.pdf)

144. Having carefully considered the agreements marked documents 7, 8 and 9, the Commissioner has identified paragraph 6 and schedule 1 of document 7, and schedule 1 of document 9 as containing the publicly available information.

145. The Commissioner therefore finds that the information in paragraph 6 and schedule 1 of document 7, and schedule 1 of document 9 was incorrectly withheld under the Act and should have been disclosed to the complainant at the time of the requests.

146. In terms of the information in document 8 and the remainder of the information in documents 7 and 9, the Commissioner is not persuaded that disclosure would have been likely to prejudice the public authority's or Sky's commercial interests. In his view, there is nothing in both agreements of a commercially sensitive nature. The amendments and variations recorded relate to less sensitive parts of the agreement and in the Commissioner's view, would not, on their own, have been prejudicial to either party's commercial interests.



147. However, for the same reasons outlined in paragraph 135 above, the Commissioner finds that the signatures (not the names of the signatories) were correctly exempt on the basis of the exemption at section 43(2).

### **Public Interest Test**

148. Section 43(2) is a qualified exemption and accordingly subject to a public interest test. This means that the Commissioner must decide whether, in all the circumstances of the case, the public interest in favour of maintaining the exemption (in relation to the information he decided was correctly exempt on the basis of section 43(2)) outweighed the public interest in disclosure.

149. For ease of reference, the Commissioner has listed below the information he considered was correctly exempt on the basis of section 43(2).

150. **Document 1** - Digital distribution agreement between Sky and the public authority dated 9 June 2004. Specifically;

Clauses 2.5 - 2.6

Clauses 4.1 – 4.3

Clauses 4.4(c) and 4.4(d)

Clause 4.6

Clause 5.1(b)

Clauses 5.2 – 5.5

Clause 5.8 – 5.9 and 12.5

Clause 6.2.2 – 6.12

Clause 7

Clauses 8.1 – 8.2(i) & 8.2(ii)

Clauses 9.1 – 9.7

Clause 10.14

Clauses 11.1 – 11.2

Clauses 13.2.1, 13.3, 13.4, and 13.5 (including 13.5.1 and 13.5.2)

151. **Document 2** – A paper presented to the public authority's board regarding the review of its strategy in relation to E4/Free-to-Air dated 19 April 2005.

### **Public interest arguments in favour of disclosing the requested information**

152. The public authority did not make any representations to either the complainant or the Commissioner as to whether it considered there was a public interest in disclosure.

153. In *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013), the Tribunal commented on the general public interest in openness. According to the Tribunal;

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.'  
(Paragraph 87).

154. Specifically in this case the Commissioner also considers that there was a public interest in the public authority being open and transparent regarding its financial position following the decision to transfer E4 to Freeview and not extend its digital distribution agreement with Sky.

155. Disclosure could have also shed light on the extent to which the public authority changed the distribution agreement in order to increase its revenue. There is also a public interest in disclosing additional information regarding the public authority's rationale for amending the distribution agreement as well as its financial projections.

### **Public interest arguments in favour of maintaining the exemption**

156. The public authority explained that while it was a public authority for the purposes of the Act it does not receive public funding and generates revenue through its commercial enterprises which include advertising and subscription revenue from commercially run platform operators such as Sky and Virgin Media. The public authority therefore

- argued that its commercial strategy and decision making in relation to contracting with television platforms was key to its ongoing ability to generate income and compete with its competitors.
157. The public authority further explained that E4 is not a public service channel and members of the public do not have any statutory rights of access to the channel for free or indeed at all. Therefore, the decision to exploit the channel on a retail basis and thereby enhance its advertising revenue was based purely on a commercial strategy. The public authority argued therefore that it should be entitled to determine the most appropriate way in which to exploit its commercial broadcasting rights free from public scrutiny as to do otherwise would seriously undermine its business interests.
158. In addition, the public authority argued that third parties with whom it conducts business must be able to rely, where appropriate, on negotiations and transactions being carried out in confidence particularly where agreements are covered by specific confidentiality provisions as is the case regarding the withheld information in relation to the agreements and correspondence about E4.
159. The public authority also argued that the complaint which was based on the public interest in making E4 available to Sky box owners on a free to view basis was misconceived in light of the fact that E4 is not a public service channel and there is no obligation imposed on the public authority to make E4 available to the public on a free to view basis.
160. However, it confirmed that notwithstanding the above position, the E4 channel was now available on a free to view basis on Sky's Freesat package.

### **Balance of the public interest arguments**

161. The Commissioner appreciates that the public authority, unlike private broadcasters, is in a difficult position with regards to determining the level of public scrutiny it should expose itself to while at the same time preserving its competitive edge by not disclosing commercially sensitive information which could make it vulnerable to its competitors.
162. The Commissioner further acknowledges that the public authority is largely commercially funded and that the E4 channel is primarily a commercial channel which operates under the auspices of '4 Ventures', a subsidiary of the public authority which was created to run its commercial activities.

163. Nevertheless, the public authority's remit remains that of a public service broadcaster and therefore the approach to determining whether the information it has withheld should be disclosed has to be in accordance with the provisions of the Act.
164. Section 43(2) recognises that public authorities could sometimes hold commercial information and that there could also be a public interest in not disclosing commercially sensitive information. It is therefore for the public authority to justify why it considers that the public interest does not favour disclosure.
165. In the Commissioner's opinion, the arguments against the disclosure of information which would be likely to prejudice the public authority's commercial interests and/or parties the public authority transacts with deserve significant weight in this case. In his view the harm would likely be significant and given that the public authority negotiates with parties about similar delivery issues on a regular basis is likely to occur frequently. As a largely commercially run enterprise, there is an inherent public interest in ensuring that the public authority is able to meet its public service remit through maximising the income it receives from E4 and its other commercial channels. Therefore, making it less competitive would run contrary to that objective.
166. The Commissioner however also recognises that there is a public interest in fully understanding the financial implications of the public authority's decision to air E4 on Freeview given that it was already in a distribution agreement with Sky at the time it took the decision. He further considers that as a public service broadcaster there is a public interest in ensuring that Channel Four is transparent about its actions and accountable for its decisions.
167. The Commissioner, however, finds that on balance, the public interest favours maintaining the exemption at section 43(2) in relation to the information identified above. He is persuaded that the disclosure of the relevant information would have been likely to weaken the public authority's competitiveness and therefore not in the public interest. Protecting the public authority from the possible consequent effect of disclosure on its revenue outweighed the need for greater transparency.

### **Procedural Requirements**

168. A public authority is required by virtue of the provisions of section 17(1)(b) to issue a refusal notice which specifies the exemption(s) being relied upon within 20 working days. This includes stipulating the relevant sub section of the exemption.

169. The Commissioner finds the public authority in breach of section 17(1)(b) for failing to specify to the complainant that it was relying on the exemption at section 43(2) of the Act.
170. Section 17(3) also stipulates that a public authority should provide details of the outcome of its public interest assessment either in its refusal notice or within a reasonable time.
171. The Commissioner finds the public authority in breach of section 17(3) for not including details of the public interest factors it considered in favour of disclosure in its refusal notice.
172. Under sections 1(1)(b) and 10(1) a public authority is required, upon a request for information, to disclose the requested information promptly and no later than 20 working days.
173. The Commissioner finds the public authority in breach of sections 1(1)(b) and 10(1) for not making available to the complainant the information in paragraph 6 and schedule 1 of document 7, and schedule 1 of document 9 at the time of the request. The public authority is also in breach of sections 1(1)(b) and 10(1) not disclosing the information he has ordered should be disclosed following his investigation.

## The Decision

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174. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - i) The public authority correctly withheld parts of the information (as summarised in Annex A) in documents 1 and 4 on the basis of the exemption at section 41
  - ii) The public authority correctly withheld parts of the information (as summarised in Annex A) in document 1 and all of the information in document 2 on the basis of the exemption at section 43(2).
175. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- i) The public authority incorrectly withheld some of the information in document 1 on the basis of the exemption at section 41. The public authority also incorrectly withheld some of the information in document 1 on the basis of the exemption at section 43(2).
- ii) The public authority incorrectly withheld all of the information in document 3 on the basis of the exemption at section 43(2).
- iii) The public authority incorrectly withheld the remainder of the information in document 4 on the basis of the exemptions at sections 41 and 43(2).
- iv) The public authority incorrectly withheld all of the information in document 6 on the basis of the exemptions at sections 41 and 43(2).
- vi) The public authority incorrectly withheld all of the information in documents 7, 8, and 9 on the basis of the exemption at sections 41 and 43(2) of the Act.
- vii) The public authority breached sections 17(1)(b) and 17(3) for issuing a defective refusal notice and for not providing complete details of its public interest assessment in the refusal notice.
- viii) The public authority breached sections 1(1)(b) and 10(1) for failing to disclose the information he has ordered disclosed at the time of the requests.

## Steps Required

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176. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Provide the complainant with the information listed in Annex A to this notice as disclosable.

177. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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178. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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179. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
180. Section 51 of the Act empowers the Commissioner to request information via an Information Notice from a public authority to assist him in ruling on an application made under section 50.
181. In practice, the Commissioner does not usually need to resort to an Information Notice to obtain information (including withheld information) from public authorities during the course of an investigation. Public authorities have generally recognised the Commissioner's remit in this regard and Information Notices are not usually issued in the normal course of business unless there have been unnecessarily long delays by the public authority or the public authority is genuinely concerned about supplying information to the Commissioner (and disagrees with the Commissioner on this point).
182. The Commissioner would like to record his concern at the public authority's unwillingness to voluntarily supply all of the withheld information needed for him to make a determination on the section 50 application in this case. The Commissioner is particularly concerned by the public authority's reasons for its refusal to supply the withheld information voluntarily. It is not for a public authority to decide for the Commissioner whether he should be able to reach a decision on the application of exemptions on the strength of a sample of the withheld information.
183. The Commissioner would also like to record his concern at the public authority's blanket application of exemptions. It is clear that the provisions of the Act apply to information rather than documents. There is also jurisprudence which suggests that if information can be divided, then provisions of the Act should be applied to the information rather than to the document as a whole unless there is no doubt that the relevant provisions apply to all of the information.



## Right of Appeal

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184. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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 sent.

**Dated the 23<sup>rd</sup> day of June 2010**

**Signed .....**

**Jo Pedder  
Group Manager**

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

**Annex A**

Document Title	Disclose	Withhold	Exemption engaged in relation to the withheld information
<b>Document 1</b> - digital distribution agreement between Sky and the public authority dated 9 June 2004	<p>Pages 1-9</p> <p>Pages 10, 11(excluding clause 2.5), clauses 3 – 3.2</p> <p>Clauses 4.4(a) –(b) &amp; 4.5</p> <p>Clauses 4.7 – 4.9.3 &amp; 4.10 – 4.10.3</p> <p>Clauses 5 – 5.1(a), (c), (d), and (e), 5.6 – 5.7, 5.10, 5.11 – 5.14</p> <p>Clauses 6, 6.1, 6.2, and 6.2.1</p> <p>Clauses 8 – 8.9</p> <p>Clauses 9, 10, 10.1 – 10.13</p> <p>Clauses 11 and 11.1</p> <p>Clauses 12, 12.1 (a, b,</p>	<p>Clauses 2.5 - 2.6</p> <p>Clauses 4.1 – 4.3</p> <p>Clauses 4.4(c) and 4.4(d)</p> <p>Clause 4.6</p> <p>Clause 5.1(b)</p> <p>Clauses 5.2 – 5.5</p> <p>Clause 5.8 – 5.9 and 12.5</p> <p>Clause 6.2.2 – 6.12</p> <p>Clause 7</p> <p>Clauses 8.1 – 8.2(i) &amp; 8.2(ii)</p> <p>Clauses 9.1 – 9.7</p> <p>Clause 10.14</p> <p>Clauses 11.1 – 11.2</p> <p>Clauses</p>	Section 43(2)

	<p>C), 12.2 – 12.4, 12.6 – 12.8</p> <p>Clauses 13, 13.1 (including 13.1.1, 13.1.2, 13.1.3, 13.1.4, 13.1.5, 13.1.6), 13.2, 13.2.2, 13.6, 13.7, and 13.8</p> <p>Clauses 14, 14.1 – 14.3</p> <p>Clauses 15, 15.1 – 15.11</p> <p>Page 38 (excluding signatures)</p>	<p>13.2.1, 13.3, 13.4, and 13.5 (including 13.5.1 and 13.5.2).</p>	
<p><b>Document 2</b> – A paper presented to the public authority's board regarding the review of its strategy in relation to E4/Free-to-Air dated 19 April 2005.</p>	N/A	All of the information in document 2.	Section 43(2)
<p><b>Document 3</b> Part of the minutes of the public authority's board meeting</p>	All of the information in document 3	N/A	

dated 25 April 2005.			
<b>Document 4</b> Email exchanges between the public authority and Sky from 20-26 April 2005	First Email in the chain (excluding the fourth, fifth, and ninth paragraphs)	Remainder of information in document 4	Section 41
<b>Document 6</b> Email exchange between Sky and the public authority from 27-28 April 2005	First, second and last emails in the chain	N/A	
<b>Document 7</b> Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and the public authority (unsigned) dated 20 December 2007	All of the information in document 7	N/A	
<b>Document 8</b> Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4	All of the information in document 8	N/A	

Ventures Limited dated 31 January 2008			
<b>Document 9</b> Deed of amendment for digital DTH distribution of E4 and More 4 between Sky and 4 Ventures dated 29 April 2008.	All of the information in document 9	N/A	

## Legal Annex

### General Right of Access

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

"Any person making a request for information to a public authority is 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."

**Section 1(2)** provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

**Section 1(3)** provides that –

"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

**Section 1(4)** provides that –

"The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –



“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

### **Vexatious or Repeated Requests**

**Section 14(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

**Section 14(2)** provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

### **Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

### **Commercial interests**

**Section 43(1)** provides that –

"Information is exempt information if it constitutes a trade secret."

**Section 43(2)** provides that –

"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)."

**Section 43(3)** provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."