

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2017

Public Authority: Ofcom

Address: Riverside House
2a Southwark Bridge Road
London SE1 9HA

Decision (including any steps ordered)

1. The complainant has requested information about parcel operators. Ofcom withheld the information under section 44 of the FOIA (prohibitions on disclosure). During the Commissioner's investigation, although it maintained its position that it had correctly applied section 44(1)(a) to the request, Ofcom voluntarily released the requested information to the complainant.
2. The Commissioner's decision is that Ofcom was entitled to rely on section 44(1)(a) when it originally withheld the disputed information.
3. The Commissioner does not require Ofcom to take any steps to ensure compliance with the legislation.

Request and response

4. On 17 March 2017, the complainant wrote to Ofcom and requested information in the following terms:

"I refer to Ofcom's Review of the Regulation of Royal Mail (non-confidential version) dated 1 March 2017. Further, I refer to Figure 6.1: "Total mail integrity complaints and incidents per item conveyed (2015-16) – Parcel operators". Please disclose the names of the operators which have been redacted from the first column."

5. Ofcom responded on 31 March 2017. It refused to provide the requested information, citing section 44 of the FOIA as its basis for doing so, by virtue of section 56 of the Postal Services Act 2011 (PSA). This section of the PSA – '*General restriction on disclosure of information*' – prohibits disclosure of information relating to businesses.
6. Ofcom provided a review on 25 April 2017, in which it maintained its original position. Ofcom explained further that section 56 of the PSA applies to information that Ofcom has obtained by virtue of its powers, and which relates to a business. It considered that the information the complainant has requested (ie names of companies) is information obtained by virtue of Ofcom's powers under the PSA, and relates to a company.
7. During the Commissioner's investigation Ofcom reconsidered the request. Section 56(2)(b) of the PSA says that disclosure of information is permitted for the purpose of facilitating the carrying out by Ofcom of any of its functions. Ofcom revised its view on whether disclosure would facilitate the exercise of Ofcom's functions under the PSA, pursuant to section 56(2)(b). Ofcom reached the conclusion that the names of the parcel operators could be released, provided that this was done in such a way that no implication could be drawn as to the relative sizes of the different businesses. Ofcom released the information to the complainant on 6 September 2017.

Scope of the case

8. The complainant contacted the Commissioner on 26 April 2017 to complain about the way his request for information had been handled.
9. In view of the fact that Ofcom had released the requested information to the complainant, and that her assessment was that Ofcom had, nonetheless, been entitled to rely on section 44, the Commissioner considered that the most expedient way forward in the circumstances would be for the complainant to withdraw his complaint. The complainant preferred to conclude his complaint through a decision notice.
10. The complainant was also bothered by the fact that Ofcom had not gone on to publish the released information and was not obliged to do so, under the FOIA. The Commissioner has discussed this matter under 'Other matters'.
11. The Commissioner's investigation has focussed on whether Ofcom was entitled to rely on section 44 of the FOIA when it originally refused to disclose the information the complainant had requested.

Reasons for decision

12. Section 44(1) of the FOIA says that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it (a) is prohibited by or under any enactment, (b) is incompatible with any EU obligation, or (c) would constitute or be punishable as a contempt of court.
13. Section 44 is an absolute exemption; that is, it is not subject to any public interest test.
14. In its submission to the Commissioner, Ofcom confirmed that it had withheld the information under section 44(1)(a) of the FOIA and that the enactment that prohibited disclosure was the PSA. Ofcom confirmed to the Commissioner that it continued to consider that the section 44 exemption was correctly applied in both its original response and at internal review.
15. As it explained in its correspondence with the complainant, Ofcom confirmed that it considered that disclosing the names of parcel operators was prohibited under section 56(1) of the PSA because the information was obtained during the course of Ofcom's work and it related to the affairs of businesses.
16. Pursuant to section 56(2), which states when disclosure is permitted, Ofcom has also told the Commissioner that consent had not been given for disclosure and that it had not considered disclosure was required for the purpose of facilitating the exercise of its functions. (Ofcom noted that, in this context, Ofcom's obligations under FOIA are not relevant functions under section 56 PSA.)
17. The Commissioner has therefore considered whether the information was obtained by Ofcom during the course of its work and whether it related to the affairs of businesses.
18. Ofcom is the UK's communications regulator; regulating, amongst other sectors, postal services. The Commissioner is satisfied that the requested information, which is for the names of particular parcel operators in the context of numbers of particular complaints about parcel operators, would have been obtained by Ofcom during the course of its work as a regulator. She is also satisfied that the information relates to the affairs of businesses; namely the number of such complaints about parcel operators.
19. The Commissioner is therefore satisfied that the exemption provided by section 44(1)(a) is, therefore, engaged and Ofcom was not required to disclose the requested information under the FOIA.

20. As detailed at paragraph 7, Ofcom did go on to release the information to the complainant. It did this voluntarily and was not obliged to do so under the FOIA.

Other matters

21. The complainant considered that, because it had released the information to him as a result of his request, Ofcom should also actively publish this information.
22. The Commissioner explained to the complainant that section 1(1) of the FOIA places an obligation on public authorities to release information when it is requested. It does not place an obligation on authorities to publish information when it is requested and released.
23. Although the Commissioner welcomes public authorities actively publishing information, she noted that many public authorities do not publish – on their websites or elsewhere - the information that they release in response to FOIA requests. As above, they are not obliged to.
24. The FOIA *does* require every public authority to have a publication scheme and to routinely publish information covered by the scheme.
25. A public authority may volunteer to also publish additional information it releases in response to a particular FOIA request but it is not a requirement of the FOIA, unless the requested information is included in its publication scheme.
26. In this case, the Commissioner considers that the requested information would not be included in Ofcom's publication scheme as Ofcom considers that the information is exempt from release under section 44.

Right of appeal

27. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
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Wycliffe House
Water Lane
Wilmslow
Cheshire
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