

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2017

Public Authority: Office of Communications
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant has requested information on meetings between the Chief Executive of OFCOM and Messrs Murdoch. The Office of Communications (OFCOM) refused to provide the requested information, relying on section 44(1)(a) of FOIA (prohibitions on disclosure) in order to do so. In particular OFCOM cited the statutory prohibition on disclosure created by section 237 of the Enterprise Act 2002.
2. The Commissioner's decision is that OFCOM has correctly applied section 44(1)(a) and the Commissioner does not require the public authority to take any steps.

Request and response

3. On 1 June 2017 the complainant made a request for information under the FOIA for:

'I am sending this request under the Freedom of Information Act. Please disclose all records of and minutes of meetings between Sharon White, chief executive of Ofcom and a) James Murdoch b) Lachlan Murdoch from May 1st 2017 to date.'
4. OFCOM responded on 29 June 2017 and provided some information within the scope of the request but refused to provide the remainder. OFCOM explained that:

'A meeting took place between the above parties on 30 May 2017, at Ofcom's offices and notes were taken in order to produce a file note. However, the information requested is being withheld as it falls under the exemption in section 44 of the FOI Act. Under this section the notes we hold are exempt from disclosure since this information came to us in connection with the exercise by us of our functions under the Enterprise Act 2002 and disclosure is prohibited under part 9 of that Act.'

5. On 30 June 2017, the complainant requested a review of the decision:

'While I accept some information will be covered by this exemption, there is no reason you cannot provide me with a redacted version of the minutes of this meeting, with sensitive information directly related to your functions under the Enterprise Act redacted.'

6. OFCOM provided the outcome of the internal review on 27 July 2017 and upheld its position.

Scope of the case

7. On 3 August 2017 the complainant wrote to the Commissioner and argued that:

'I disagree that the entirety of the record held by Ofcom will fall under section 44. It seems likely that some information could be disclosable in redacted form. Please consider whether any of the information concerned could be disclosed, and adjudicate this matter accordingly.'

8. The Commissioner considers the scope of her investigation to be to determine whether OFCOM has correctly applied section 44(1)(a) to withhold the information.

Reasons for decision

9. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under enactment.
10. OFCOM states that it is prohibited under Part 9 section 237 of the Enterprise Act 2002 (EA2002) from disclosure of "specified information" as defined in section 238 of the EA2002. The Information Tribunal has

previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and has concluded it can be used in this way¹.

11. However, in order for the prohibition to be applicable the Commissioner must first consider if the information would be "specified information". Section 238 of the EA2002 defines specified information as information that:

'comes to a public authority in connection with exercise of any function it has under or by virtue of –

(a) Part 1, 3, 4, 6, 7 or 8;

(b) an enactment specified in Schedule 14;

(c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.'

12. In this case the withheld information is the file note created by OFCOM following the meeting on 30 May 2017 between the OFCOM Chairman and Messrs Murdoch. The meeting took place as part of OFCOM's first stage investigation into the two public interest considerations as required by the Secretary of State for Culture, Media and Sport.

13. OFCOM explained that:

'On 3 March 2017, 21st Century Fox, Inc ("Fox") notified the European Commission of its intention to acquire the shares in Sky plc ("Sky") it does not already own. On 16 March 2017, the Secretary of State for Culture, Media and Sport issued a European Intervention Notice under section 67 of the EA02 requiring Ofcom, under Article 4 of the 2003 Order, to report on the effects of the proposed transaction on the following two public interest considerations, as set out in section 58 of the EA02:

- whether there would be sufficient plurality of persons with control of the media enterprises; and
- whether the parties would have genuine commitment to the attainment in relation to broadcasting of standards objectives.

Ofcom's role was to conduct a first stage investigation into these two public interest considerations and, on the basis of this investigation, to

¹ *Dey v ICO and OFT (EA/2006/0057)*

provide advice and recommendations that may be relevant to the Secretary of State's decision on whether to refer the transaction to the Competition and Markets Authority ("CMA") for further assessment...

On 20 June 2017, we provided our public interest report² to the Secretary of State...We did not consider it was necessary to include in the public interest report, or to disclose elsewhere, any of the information contained in the file note to discharge our functions.'

14. Therefore, the Commissioner is satisfied that the meeting was part of the process to review mergers and that OFCOM was exercising its functions under Part 3 of the EA2002.
15. The Commissioner has viewed the file note and considers that the whole document concerns the meeting held on 30 May 2017. It is information received by OFCOM in connection with the performance of its functions under the EA2002 and therefore constitutes 'specified information'.
16. The Commissioner notes that the information has been internally created. Previous decisions of the Commissioner³ and the Information Tribunal⁴ have accepted that the prohibition on disclosure can extend to the views of the public authority, considerations and other internally-created information where the 'created' information incorporates information received by the public authority from another party.
17. Sections 239-243 of the EA2002 provide certain 'gateways' for disclosure of specified information. These gateways do not compel OFCOM to disclose information but do allow it to disclose information for the purposes set out in these sections. In the *Dey* case the Information Tribunal commented on the gateways and stated that "*it gives a power to disclose, not a duty*". The Commissioner therefore accepts that OFCOM has discretion as to whether to use the gateways to disclose specified information.
18. OFCOM have confirmed that it does not have consent to disclose this specified information from the individuals or businesses to which the file note relates and does not consider any of the gateways to be applicable.

² *Ofcom's report to the Secretary of State: Public interest test for the proposed acquisition of Sky plc by Twenty- First Century Fox, Inc.*
https://www.ofcom.org.uk/_data/assets/pdf_file/0012/103620/public-interest-test-report.pdf

³ ICO Decision Notice FS50468587

⁴ EA/2013/0098 and EA/2009/0033

19. Following the binding decision of the Upper Tribunal in 2011 (*Ofcom v Gerry Morrissey and the IC*, 2011 UKUT 116 AAC), the Commissioner will not question or examine the reasonableness of the authority's decision. If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.
20. Therefore, the Commissioner accepts that there was no obligation on OFCOM to disclose the specified information.
21. In conclusion, the Commissioner's decision is that OFCOM has correctly applied section 44(1)(a) to withhold all the requested information in this case.

Right of appeal

22. 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

23. 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.
24. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF