

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that Ofcom correctly applied section 44(1) of FOIA to the request for correspondence about a complaint about the BBC as there is a prohibition on disclosure. It is not necessary for Ofcom to take any steps.

Request and response

2. In their complaint to the Commissioner dated 7 November 2022, the complainant said that Ofcom was handling a complaint they had submitted to it in February 2022 about the BBC's lack of impartiality in Scottish news. Ofcom had advised the complainant that it had exchanged emails with the BBC about the complaint. Ofcom said that it had written to the BBC only to ascertain the stage the original complaint had reached within the BBC complaints system. Ofcom also said that the BBC had advised that it had finished dealing with the complaint.
3. The complainant made the following information request to Ofcom on 30 September 2022:

"I would like you to send me both the emails/letters you sent to the BBC and their replies."

4. Ofcom's final position was to refuse the request under section 44(1) of FOIA.

Reasons for decision

5. This reasoning covers Ofcom's application of section 44(1)(a) of FOIA to the complainant's request.
6. Under section 44(1)(a) of FOIA information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it is not subject to the public interest test.
7. In their request for an internal review, the complainant said:

"I ask for a review on the basis that the justification you advance for your refusal to disclose is transparently false. What possible information about the BBC could be disclosed to me by showing me their reply to your letter to them (the BBC) asking them if they had completed their dealings with my complaint to the BBC? You know perfectly well that you have some other reason for refusing to disclose this information and you are not being wholly honest here."
8. Ofcom has provided the Commissioner with a copy of the information it is withholding. In its associated submission, Ofcom has confirmed what it advised the complainant in its response to the request and internal review response. Namely, that the correspondence Ofcom holds that is relevant to the request is exempt from disclosure under section 44 of FOIA by reason of section 393(1) of the Communications Act 2003 and that the gateways for disclosure under section 393(2) of the Communications Act had not been engaged.
9. Section 393(1) of the Communications Act 2003 states that information with respect to a particular business which has been obtained in exercise of a power conferred by the Communications Act 2003 is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.
10. Ofcom acknowledges that it has not requested the BBC's consent to disclose the information. However, it considers that it would be reasonable in the circumstances to assume that the BBC would not consent to this information being disclosed. Ofcom's position is that the above gateway for disclosure and those under section 393(2) of the Communications Act 2003 are not engaged.

11. Ofcom has noted the Commissioner's decision in [FS50416106](#). That decision establishes that "The Commissioner considers that the wording of complaints about particular programmes is clearly information with respect to the business that broadcast that programme". Ofcom considers that this is consistent with its approach to information requests about specific complaints it has received about a particular broadcast.
12. Ofcom has explained that its procedures in relation to handling broadcast standards complaints make clear that individual complainants play an important role in notifying Ofcom of a potential breach of the Broadcasting Code and that it logs and acknowledges every complaint. However, Ofcom's functions in relation to 'standards' complaints involve objectively determining the question of whether a broadcaster has breached a standards requirement under the Broadcasting Code, rather than an adjudication of the rights or concerns of individual complainants.
13. For this reason, Ofcom does not ordinarily correspond with individual complainants after a complaint has been received. It therefore follows that any internal information Ofcom generates in the course of exercising its complaint handling functions, such as conducting an initial assessment and/or an investigation, is information about the relevant broadcaster, rather than the individual complainant(s) who alerted Ofcom to the potential breach.
14. In this case, the complainant had requested correspondence with a particular broadcaster (the BBC) discussing a complaint Ofcom received about a programme broadcast by that broadcaster in exercise of its functions under section 319 of the Communications Act. Ofcom notes that the complainant requested correspondence about their complaint to the BBC. As explained above, Ofcom considers that its duties under section 393(1) of the Communications Act 2003 extend to the investigatory process into a complaint it has received, including correspondence with the broadcaster in respect of that complaint. Ofcom therefore maintains that the exemption under section 44 of FOIA applies to the information requested.
15. The Commissioner is satisfied that Ofcom obtained the requested information from a business in the course of Ofcom's work as a regulator. The Commissioner is also satisfied: that the Communications Act 2003 prohibits Ofcom from disclosing this information; that, whilst acknowledging that Ofcom did not consult the BBC, the BBC would not consent to the information's release; and that there is no other statutory gateway that would permit the information to be released.

16. The Commissioner's decision is therefore that Ofcom is entitled to rely on section 44(1)(a) of FOIA to withhold the information the complainant has requested. In addition to FS50416106, this decision is in line with those in [FS50868934](#) and [FS50559898](#).

Right of appeal

17. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

18. 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.
19. 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

Cressida Woodall
Senior Case Officer
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Wycliffe House
Water Lane
Wilmslow
Cheshire
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