

Reference: 529088

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18 April 2018

### **Freedom of Information: Right to know request**

Thank you for your request for information where you asked about papers referred to in the minutes of Content Board meetings.

This was received by Ofcom on 19 March 2018 and it has been considered under the Freedom of Information Act 2000 (the Act).

You asked:

*For each Content Board meeting in 2017, please provide all papers referred to in minutes of meetings as having provided details of key policy and project work undertaken by the Executive since the previous meeting.*

The papers provided updates on policy and project work related to matters about to be published or which had been published. To the extent that the request contains information about Ofcom's work which has now been published and therefore accessible to you, it is exempt under section 21 of the Act. Under this section, we are not required to provide information in response to a request if it is already reasonably accessible to you.

Some of the following subjects were discussed in these papers and, to be helpful, we have provided links to them below:

- Fox/Sky merger 'Fit and Proper' decision:  
[https://www.ofcom.org.uk/data/assets/pdf\\_file/0012/103620/public-interest-test-report.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf)
- Public interest test for the proposed acquisition of Sky plc by 21<sup>st</sup> Century Fox, Inc:  
[https://www.ofcom.org.uk/data/assets/pdf\\_file/0012/103620/public-interest-test-report.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0012/103620/public-interest-test-report.pdf)
- BBC Charter Review: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/bbc-operating-framework>
- BBC Operating Licence:  
[https://www.ofcom.org.uk/data/assets/pdf\\_file/0017/107072/bbc-operating-licence.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0017/107072/bbc-operating-licence.pdf)

- BBC Scotland: <https://www.ofcom.org.uk/consultations-and-statements/category-3/bbc-scotland-television-channel>
- Local tv – London live: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/96252/London-Live-decision.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/96252/London-Live-decision.pdf)
- On demand programme services (ODPS) accessibility Statement: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0011/100226/accessibility-on-demand-programme-services-statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0011/100226/accessibility-on-demand-programme-services-statement.pdf)
- Diversity in broadcasting: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/diversity>
- Channel 4 Statement of Media Content Policy 2016/2017: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0019/104095/Ofcom-letter-to-Channel-4-Corporation-on-its-Statement-of-Media-Content-Policy-2016-2017.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0019/104095/Ofcom-letter-to-Channel-4-Corporation-on-its-Statement-of-Media-Content-Policy-2016-2017.pdf)
- Health and wealth claims in programming report: [https://www.ofcom.org.uk/data/assets/pdf\\_file/0016/104650/Health-claims-report.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0016/104650/Health-claims-report.pdf)

The papers also contain information that is not public. Such unpublished information includes information relating to stakeholders and legal advice and is therefore exempt under section 44 and section 42 of the Act respectively.

Section 44 allows information to be withheld when its disclosure is prohibited under other legislative provisions, namely section 393 of the Communications Act 2003. This particular provision prevents Ofcom from disclosing information about a particular business unless we have the consent of that business or unless release of that information helps Ofcom to carry out its duties, neither of which applies here. In addition, this is to ensure that Ofcom can operate effectively by being able to handle and share confidential information with the businesses it regulates. For further information on section 44 of the Act, please see: <http://www.legislation.gov.uk/ukpga/2000/36/section/44>.

The exemption under section 42 of the Act deals with information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. In applying section 42 we have considered whether the public interest in withholding the information outweighs the public interest in disclosing it. Annex A to this letter sets out the section 42 exemption in full, as well as the factors Ofcom considered when deciding where the public interest lay.

Any information not covered by these exemptions is withheld under section 36 of the Act. Section 36 exempts information from disclosure if it would, or would be likely to, inhibit the free and frank provision of advice or views for the purposes of deliberation or prejudice the effective conduct of public affairs. This is a qualified exemption and is subject to a public interest test. Broadly, this means that the information should only be withheld under the exemption where the public interest in doing so outweighs that in favour of disclosure.

The public interest test is detailed in Annex C to this letter. In the letter in Annex B, Steve Gettings as a “qualified person” confirms that in his reasonable opinion disclosure would prejudice the three elements of Section 36(2)(b) and (c) is not in the public interest for Ofcom to disclose the information.

These papers covered a wide range of topics. Please let us know if you have a specific interest.

If you have any queries, then please contact [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk). Please remember to quote the reference number above in any future communications.

Yours sincerely,

**Jerin John**

If you are unhappy with the response or level of service you have received in relation to your request from Ofcom, you may ask for an internal review. If you ask us for an internal review of our decision, it will be treated as a formal complaint and will be subject to an independent review within Ofcom. We will acknowledge the complaint and inform you of the date by which you might expect to be told the outcome.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

#### **Timing**

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for undertaking internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exceptional cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact:

Steve Gettings  
The Secretary to the Corporation  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

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

**Annex A**

<b>Section 42 – Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.</b>	
<b>Factors for disclosure</b>	<b>Factors for withholding</b>
<ul style="list-style-type: none"> <li>• Open policy making and public confidence in regulated activities.</li> </ul>	<ul style="list-style-type: none"> <li>• Ofcom considers the request for Ofcom’s internal legal advice is a request for information of which a claim to legal professional privilege could be maintained in legal proceedings. It is advice given by external legal advisers retained by Ofcom and by Ofcom’s own salaried in-house legal advisers and is connected with the giving or obtaining of legal advice.</li> </ul>
<b>Reasons why public interest favours withholding information</b>	
<ul style="list-style-type: none"> <li>• It is in the public interest that policy decisions taken by Ofcom are taken in a fully informed legal context, where relevant. Ofcom therefore needs high quality effectively obtained legal advice for the effective conduct of its business. That advice needs to be given in context, and with a full appreciation of the facts. It needs to be sought and given in a timely fashion to ensure that policy develops in a fully informed way.</li> <li>• Legal advice cannot be effectively obtained unless Ofcom is able to put all the facts before its legal advisers without fear that they may afterwards be disclosed and used to its prejudice. Without such effectively obtained advice, the quality of Ofcom’s decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.</li> </ul>	

**Annex B**

**Freedom of Information: Right to know request**

**Section 36 exemption**

A part of the information you requested is being withheld as it falls under the exemption in section 36 of the Freedom of Information Act.

I am a "qualified person" as defined in section 36(2) of the Freedom of Information Act 2000 and duly authorised by a Minister of the Crown for the purposes of that section. In my reasonable opinion, disclosure of the information requested would, or would be likely to, prejudice the effective conduct of public affairs.

Also, in applying this exemption I have had to balance the public interest in withholding the information against the public interest in disclosing the information.

I have set out in Annex C the exemption in full, as well as the factors I considered when deciding where the public interest lay in relation to the information concerned. If you have any queries about this letter, please contact [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk).

Signed .....  .....

Date .....  .....

## Annex C

### Section 36: Prejudice to Effective Conduct of Public Affairs

Section 36 exempts information whose disclosure would, or would be likely to, have any of the following effects:

- inhibit the free and frank provision of advice,
- inhibit the free and frank exchange of views for the purposes of deliberation; or
- prejudice the effective conduct of public affairs.

#### Key points:

- Section 36 can only be used if, in the **reasonable view of a "qualified person"**, disclosure of the requested information would have one of the specified effects.
- The application of section 36 is subject to a public interest balance.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none"> <li>• The desirability of citizens being confident that decisions are taken on the basis of the best available information;</li> <li>• Knowledge that the arguments relating to a debate will be disclosable may improve the quality of those arguments.</li> <li>• The desirability of stakeholders and citizens being confident that decisions are taken on the basis of the best available information.</li> </ul>	<ul style="list-style-type: none"> <li>• Ofcom, as a sector regulator, depends heavily on its on-going relationship with Government officials and with Stakeholders. They would be less willing to come forward and discuss necessary policy issues with Ofcom employees, and would be less willing to be open in any discussions, if they knew that what they said to us would be made public.</li> <li>• Ofcom's Executive may similarly be less likely to discuss policy issues and be open in their discussions with the Content Board, if they knew what they said would be made public. Disclosure may in future discourage provision of information by the Executive to the Board and provision of information by Stakeholders and Government officials to the Executive.</li> <li>• In addition, to regulate effectively, Ofcom needs to be able to think through all the implications of particular policy options and undertake without prejudice rigorous and candid assessments. Disclosure of this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberating</li> </ul>

	and this in turn would prejudice the effective conduct of Ofcom's affairs.
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**Reasons why public interest favours withholding information**

A consequence of disclosure would be that Government officials and stakeholders would be less likely to come forward and discuss important policy issues, and be less open, with Ofcom. Ofcom would therefore be less able to gauge their views as to how effective its regulation is. Also, to disclose internal papers would mean that Ofcom employees would be less likely to discuss policy issues openly and explore all possible regulatory options.

These factors would in turn lessen Ofcom's ability to meet its statutory obligation to ensure its regulation is effective and appropriate. This would be against the public interest.