

Reference: 1092088

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20 January 2021

## Freedom of Information: Right to know request

Thank you for your request for information about our decision to amend the definition of “hate speech” in Section Three of the Ofcom Broadcasting Code (“the Code”).

We received this request on 2 January and have considered it under the Freedom of Information Act 2000 (“the Act”).

### Your request

You asked:

*Please provide documentation of any meetings (eg minutes, calendar appointments) that informed this decision, as well as details of the process that led to this policy change, as well as details of any advice you received, legal or otherwise, that led to this decision.*

*I wish to understand how Ofcom reached its new policy*

### Background

On 31 December 2020, we confirmed changes to the Code which reflect new requirements on broadcasters under the revised [Audiovisual Media Services Regulation 2020](#) (“AVMS”), and also take account of legislative changes following the end of the transition period for the UK’s withdrawal from the European Union. The decisions we have taken, and our reasoning, are set out in full in our [Statement](#) on the proposed amendments to the Broadcasting Code and the Code on the Scheduling of Television Advertising.

### Our response

Please see under Section 3 – Broadcasting Code revisions of the Statement where you will find the proposal to amend the definition of hate speech, stakeholder’s views and Ofcom’s response and reasoning for the amendment, which is now reflected in [section Three](#) of the Code. As set out in paragraph 3.12, the change was made to implement the AVMS Directive, however Ofcom is bound by the Human Rights Act 1998 and the European Convention on Human Rights. It follows that we must interpret the new definition of hate speech consistently with the right to freedom of expression, and we place great weight on that right in our decision making when assessing broadcast standards complaints against section Three of the Code.

Turning to your request, we do not hold documentation of any meetings, which include minutes and calendar appointments, that informed our decision to amend the definition of hate speech. We do hold legal advice relating to our decision to amend the definition of hate speech, however we consider that this is exempt from disclosure under section 42 of the Act. This exemption deals with information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

Section 42 is a qualified exemption, which means we have had to consider whether or not the public interest in disclosing the information you have requested outweighs the public interest in withholding it. The attached annex to this letter sets out the exemption in full, as well as the factors for and against disclosure of the information you have requested when deciding where the public interest lay.

I hope this information is helpful. If you have any further queries, then please send them to [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk) quoting the reference number above in any future communications.

Yours sincerely,

Jerin John

If you are unhappy with the response you have received in relation to your request for information and/or consider that your request was refused without a reason valid under the law you may ask for an internal review. If you ask us for an internal review of our decision, it will be subject to an independent review within Ofcom.

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 responding to 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 [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk).

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

Section 42 – Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.	
Factors for disclosure	Factors for withholding
<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 in relation to the decision to amend the definition of “hate speech” under Section Three of the Code is a request for information of which a claim to legal professional privilege could be maintained in legal proceedings. It is advice given by Ofcom’s own salaried in-house legal advisers and is connected with the giving or obtaining of legal advice.</li></ul>
Reasons why public interest favours withholding information	
<p>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.</p> <p>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.</p>	