

Reference: 356314

25 November 2016

Julia Snape
Information Requests

information.requests@ofcom.org.uk

Freedom of Information: Right to know request

Thank you for your request for information dated 2 November which we have considered under the Freedom of Information Act 2000 ('the Act').

You asked for documents relating to Brexit for the following:

- 1) *Any minutes, correspondence or memorandums relating to meetings with government ministers, or ministers of non-UK governments, relating to Brexit.*
- 2) *Any minutes, correspondence or memorandums relating to meetings with industry stakeholders relating to Brexit.*
- 3) *Copies of any briefings, reports or documents submitted to BEIS, DCMS, DEXEU, No 10 or other UK government departments relating to the implications of Brexit on Ofcom's work and communications regulation.*
- 4) *I would like a copy of any briefings, reports or documents submitted to the devolved administrations, EU institutions or non-UK governments relating to the implications of Brexit on Ofcom's work and communications regulation.*

Ofcom holds information falling within the categories set out above but, for the following reasons, is unable to disclose it.

First, section 393(1) of the Communications Act 2003 prohibits Ofcom from disclosing information which it has obtained in the course of carrying out its work and which pertains to particular businesses, unless those businesses consent, or disclosing such information is for the purpose of Ofcom carrying out its functions. Disclosing information in breach of section 393(1) may constitute a criminal offence.

In this case, some of the information you have requested has been obtained by Ofcom from various stakeholders. We do not have the consent of those stakeholders to disclose the relevant information, nor is disclosure necessary for the purposes of carrying out our functions. On this basis, section 393(1) of the Communications Act applies to certain of the information you have requested. Given this, the exemption set out in section 44 of the Act

also applies. Section 44 provides for information to be withheld in circumstances where disclosure is prevented by another statute (in this case, the Communications Act 2003). Section 44 is an absolute exemption, which means that Ofcom is not required to balance the public interest in disclosing the information.

Secondly, Ofcom considers that the information you have requested is exempt from disclosure under sections 36(2)(b)(i) and (b)(ii) of the Act. These exemptions relate to information that would, or would be likely to, prejudice the effective conduct of public affairs, which includes inhibiting the free and frank provision of advice or the free and frank exchange of views. In applying this exemption, we have had to balance the public interest in withholding the information against the public interest in disclosing it, as set out in Annex B. In Annex A, Steve Gettings as a “qualified person” confirms that section 36(2) has been engaged and that, in his reasonable opinion, it is not in the public interest for Ofcom to disclose the information you requested.

Thirdly, some of the information you have requested comprises internal legal advice, which we have withheld under section 42 of the Act. Section 42 relates to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. In applying section 42, Ofcom has had to balance the public interest in disclosing the relevant information, which we have set out in Annex C.

Please quote the above reference number in any further communication.

Yours sincerely

Julia Snape

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

Annex A

Freedom of Information: Right to know request

Section 36 exemption

The information you requested is being withheld as it falls under the exemption in section 36(2) of the Freedom of Information Act.

I am a "qualified person", as defined in section 36(5) of the Freedom of Information Act 2000, and am duly authorised by a Minister of the Crown for the purposes of that section. In my reasonable opinion, sections 36(2)(b)(i) and (ii) have been engaged. This means that disclosure of the information requested would, or would be likely to, prejudice the free and frank provision of advice and the exchange of views for the purposes of deliberation, and so 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 B the exemption in full, as well as the factors I considered when deciding where the public interest lay.

If you have any queries about this letter, please contact information.requests@ofcom.org.uk.

SignedS. Gettings.....

Date.....25 November 2016.....

Steve Gettings

Secretary to the Corporation

Ofcom

Section 36: Prejudice to Effective Conduct of Public Affairs**Annex B**

Sections 36(2)(b)(i) and (ii) exempt information from being disclosed where to do so would, or would be likely to, have any of the following effects:

- a. inhibit the free and frank provision of advice; or
- b. inhibit the free and frank exchange of views for the purposes of deliberation.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none"> • Brexit is a matter of high national importance, where members of the public may have a legitimate interest in understanding better how the Government (including the devolved administrations), Ofcom, industry stakeholders and non-UK governments are assessing the likely implications of this issue, including in relation to Ofcom’s work and the communications industry more generally. • Disclosure of the requested information may contribute to transparency in Ofcom’s policy-making, which may lead to increased trust and engagement between members of the public and Ofcom; and • Industry stakeholders and members of the public may gain increased confidence that Ofcom is taking decisions on the basis of the best available information. 	<ul style="list-style-type: none"> • Ofcom is still at an extremely formative and sensitive stage in assessing the likely implications of Brexit on the work that it does. In order to undertake this assessment, it is critical that Ofcom is able to meet with Government (including the devolved administrations), industry stakeholders and EU institutions and to exchange advice and views with these bodies on a free and frank basis. Disclosure of the requested information may undermine the relationship of trust and confidence between Ofcom and these bodies, and create a ‘chilling’ effect on the volume and quality of the information which Ofcom is able to receive. In these circumstances, there is a real risk that Ofcom may not be fully apprised of all the relevant views and facts, and that its policy-making abilities may therefore be severely compromised. • In order for Ofcom to develop effectively its approach regarding Brexit, it needs a ‘safe space’ away from the scrutiny of the general public in which to test and challenge ideas. Disclosure of the requested information may compromise

	<p>Ofcom's 'safe space', in circumstances where staff are inhibited from being able to debate issues or share information with one another on a free and frank basis.</p>
<p>Reasons why public interest favours withholding information</p>	
<ul style="list-style-type: none">• It is crucial that Ofcom has a 'safe space' in which to deliberate and that it is fully apprised of the views of all the relevant parties, namely Government (including the devolved administrations), stakeholders and EU institutions.• The disclosure of the information requested would not, in Ofcom's view, further the public interest, but may in fact hinder it because of the detriment it would have on Ofcom's ability to effectively consider the potential implications that Brexit may have on its work, taking into account all the facts and views expressed by the relevant parties.	

Annex C

<p>Section 42 – Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.</p>	
<p>Factors for disclosure</p>	<p>Factors for withholding</p>
<ul style="list-style-type: none"> • Disclosure of the requested information may contribute to transparency in Ofcom’s policy-making, which may lead to increased trust and engagement between members of the public and Ofcom. 	<ul style="list-style-type: none"> • The requested information comprises legal advice which has been provided to Ofcom by one of its in-house legal advisors on a confidential basis, and in circumstances where a claim to legal professional privilege could be maintained in legal proceedings; • The legal advice pertains to live, ongoing issues, in which Ofcom is still considering its position, and where there is therefore a heightened degree of sensitivity attached to that advice.
<p>Reasons why public interest favours withholding information</p>	
<ul style="list-style-type: none"> • It is in the public interest that policy decisions taken by Ofcom are fully informed by the applicable legal context. Ofcom therefore needs high-quality legal advice for the effective conduct of its business. In providing that advice, Ofcom’s in-house legal advisors need to be confident that they can express their views on both a candid and confidential basis so that Ofcom is in the best position to take decisions. • The disclosure of the information would not, in Ofcom’s view, further the public interest, but may in fact hinder it, where Ofcom’s in-house solicitors feel inhibited from providing full and candid advice, particularly in relation to matters which are still ongoing. 	