

Reference: 481614

21 December 2017

Julia Snape
Information requests

information.requests@ofcom.org.uk

Freedom of Information: Right to know request

Thank you for your request for information dated 11 October for the phase 1 Ofcom issues letter and Fox's response to that issues letter, which we have considered under the Freedom of Information Act 2000 ('the FoIA').

The Phase 1 Ofcom issues letter

A copy of the letter, excluding parts of the Annex, is provided. Parts of this (names, contact details and signatures) are redacted because they are subject to section 40 of the FoIA which relates to personal information.

Ofcom considers that parts of the Annex to the issues letter are exempt from disclosure pursuant to Section 36 of the FOIA for the reasons set out in Annex B to this letter. In Annex A to this letter the Corporation Secretary confirms it is not in the public interest to release this information.

Those parts of the Annex to the issues letter also fall under the exemption in section 31 of the Act, which relates to law enforcement and the functions of a public authority. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosing the information. In Annex C I have set out the exemption in full, as well as the factors Ofcom considered when deciding where the public interest lay.

In addition, parts of the Annex to the issues letter are exempt from disclosure as they are subject to the prohibition on disclosure in Part 9 of the Enterprise Act 2002. These are therefore exempt from disclosure under section 44 of the FoIA. Section 44 is an absolute exemption under the Act and does not require a public interest test.

Fox response to the issues letter

Save to the extent that the information has already been made public in our Report to the Secretary of State¹, the entirety of this information is exempt from disclosure under section 44 of the FoIA which prohibits disclosure of information if another enactment prohibits it, in this case the Enterprise Act. Our Report to the Secretary of State is available here:

<https://www.ofcom.org.uk/consultations-and-statements/category-3/public-interest-test-sky-fox>

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
SK9 5AF

¹ Such that the information is accessible to the applicant by other means and is exempt from disclosure under section 21 of the FOIA.

Annex A

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 B 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.

SignedSteve Gettings.....

Date.....21....December 2017.....

Secretary to the Corporation

Ofcom

Annex B – application of section 36 exemption to Ofcom’s issues letter

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"> • The desirability of Ofcom being transparent. • Public confidence in regulated activities 	<ul style="list-style-type: none"> • At the time that the issues letter was sent to the parties, Ofcom was at an interim stage in its assessment of the public interest considerations associated with the proposed merger. Ofcom’s full reasoning has been published (through its report to the Secretary of State of 20 June 2017). As such, disclosure of the document will not aid public understanding of the carrying out of our functions. • The CMA is currently carrying out a second stage assessment of the merger, which is considering the same public interest considerations as Ofcom’s assessment. The public interest concerns, and the parties’ response to them, are therefore being played out in public through that process. • Ofcom needs to be able to set out a case and allow the parties to respond to all issues that might exist without constraint in order to effectively carry out its functions. Disclosure risks chilling Ofcom’s ability to exchange views with merging parties freely and frankly in any future public interest process • The publication of our issues letter would be unfair to the merging parties, as it by definition does not

	<p>take account of any further evidence or representations provided to us in response to it (which we are prohibited from disclosing), such that its disclosure may prejudice the confidence of those we regulate in the regulatory process, and damage our ability to engage effectively with the parties in future cases.</p>
Reasons why public interest favours withholding information	
<p>Ofcom needs to be able to set out a case and allow the parties to respond to all issues that might exist without constraint in order to effectively carry out its functions.</p>	

Annex C

Section 31: Law Enforcement

Section 31 exempts information if disclosure would or would be likely to prejudice, among other things:

- Any public authority’s exercise of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise

Section 31 is subject to a public interest balance.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none"> • The desirability of Ofcom being transparent. • Public confidence in regulated activities. 	<ul style="list-style-type: none"> • At the time that the issues letter was sent to the parties, Ofcom was at an interim stage in its assessment of the public interest considerations associated with the proposed merger. Ofcom’s full reasoning has been published (through its report to the Secretary of State of 20 June 2017). As such, disclosure of the document will not aid public understanding of the carrying out of our functions. • The CMA is currently carrying out a second stage assessment of the merger, which is considering the same public interest considerations as Ofcom’s assessment. The public interest concerns, and the parties’ response to them, are therefore being played out in public through that process. • Ofcom needs to be able to set out a case and allow the parties to respond to all issues that might exist without constraint in order to effectively carry out its functions. Disclosure risks chilling Ofcom’s ability to exchange views with merging parties freely and frankly in any future public interest process. • The publication of our issues letter would be unfair to the merging parties, as it by definition does not take account of any further evidence or representations provided to us in response to it (which we are prohibited

from disclosing), such that its disclosure may prejudice the confidence of those we regulate in the regulatory process, and damage our ability to engage effectively with the parties in future cases.

Reasons why public interest favours withholding information

Ofcom needs to be able to set out a case and allow the parties to respond to all issues that might exist without constraint in order to effectively carry out its functions.

Tuesday 9 May

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Executive Vice President, Deputy General Counsel and Deputy Chief
Compliance Officer
Twenty-First Century Fox, Inc.
1211 Avenue of the Americas
New York, NY 10036
USA

KEVIN BAKHURST
Group Director,
Content and Media Policy

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Group General Counsel
Sky plc
Grant Way
Isleworth
TW7 5QD

Dear 540

Dear 540

21st Century Fox/Sky merger public interest assessment – potential issues

I am writing to set out the potential issues that have been identified in connection with Ofcom's ongoing assessment of the proposed merger between Twenty-First Century Fox, Inc. ("Fox") and Sky plc ("Sky").

Background

In respect of the proposed acquisition by Fox of the shares in Sky it does not already own, the Secretary of State for Culture, Media and Sport has issued a European intervention notice in relation to the public interest considerations in section 58 of the Enterprise Act 2002 concerned with the sufficiency of plurality of persons with control of media enterprises and commitment to broadcasting standards.

We have identified for the purposes of reporting to the Secretary of State, and in light of the evidence put to us by the merging parties, third parties, and our own research and analysis, the potential issues set out in the Annex to this letter.

The parties are invited to meet with Ofcom at 11.30am on Thursday 11 May 2017 to discuss the issues set out below. In addition, the parties are invited to make any representations they wish on these issues, and to provide any additional evidence they may wish to submit in writing by 5pm on Tuesday 16 May 2017.

Confidentiality

In any such representations please set out in a separate annex marked "Confidential information" any document or information which you consider to contain confidential information and supply a written explanation as to why it should be treated as such. You should also supply an edited paper and/or electronic version of the document or information.

It is for Ofcom to determine whether or not the information is to be disclosed in accordance with Part 9 of the Enterprise Act 2002. Information provided will be disclosed to the Secretary of State.

Offences

I draw your attention to section 117 of the Enterprise Act 2002 which sets out the offences created by the Act in relation to the provision of false or misleading information to Ofcom in connection with its functions under Part I of the Act.

Use of information

We may use information provided in response to this process in order to carry out our functions under section 3(3) of the Broadcasting Act 1990 and our functions under section 3(3) of the Broadcasting Act 1996.

Yours sincerely,

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Kevin Bakhurst

Annex: Potential public interest issues arising from the proposed acquisition of Sky plc by Twenty-First Century Fox, Inc.

BACKGROUND

1. On 3 March 2017 Twenty-First Century Fox, Inc. ("Fox") notified the European Commission of its intention to acquire the shares in Sky plc ("Sky") it does not already own.
2. On 16 March 2017 the Secretary of State for Culture, Media and Sport issued a European intervention notice asking Ofcom to review the transaction in light of the following public interest considerations¹, as set out in section 58 of the Enterprise Act 2002²:

"the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience" ("the plurality consideration"); and
"the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003" ("the broadcast standards consideration").
3. On 21 April 2017, in light of the announcement of the General Election held on 8 June 2017, the Secretary of State extended the deadline for the submission of our report to 20 June 2017.
4. Our role is to conduct an initial investigation into these two public interest considerations and to provide advice and recommendations for the Secretary of State's decision on whether to refer the case to the Competition and Markets Authority ("CMA") for further analysis. The Secretary of State may make a reference to the CMA if she believes that it is or may be the case that, taking account only of the public interest considerations specified by the Secretary of State, the proposed merger operates or may be expected to operate against the public interest³.
5. On 17 March 2017 we published an Invitation to Comment ("ITC"), seeking representations on the above public interest considerations. We received over 50,000 individual responses as part of this process.
6. We have identified, in light of the evidence put to us by the merging parties, third parties, and our own research and analysis, the below potential issues for the purposes of reporting to the Secretary of State.

¹ <https://www.gov.uk/cma-cases/twenty-first-century-fox-sky-merger-european-intervention-notice>

² Enterprise Act, 2002, Section 58, <http://www.legislation.gov.uk/ukpga/2002/40/section/58>

³ Article 5 of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003

7. The parties are invited to meet with Ofcom on Thursday 11 May 2017 to discuss the issues set out below. In addition, the parties are invited to make any representations they wish on these issues, and to provide any additional evidence they may wish to submit in writing by 5pm on Tuesday 16 May 2017.

THE PLURALITY CONSIDERATION

Our approach to the plurality consideration

8. Our approach to considering the plurality consideration is informed by the approach set out by the Government⁴ and by relevant precedents, in particular:
 - the Competition Commission's decision on the proposed Sky/ITV merger in 2007⁵;
 - the Competition Appeal Tribunal findings on the proposed Sky/ITV merger⁶; and
 - the Court of Appeal findings on the proposed Sky/ITV merger⁷.
9. In addition, we have taken account of our approach in previous public interest tests, including the proposed acquisition in 2010 by News Corporation of the outstanding shares of British Sky Broadcasting Group (BSkyB)⁸ which it did not own, and the measurement framework for media plurality established in November 2015⁹.

