

Reference: 01568139

Information Rights
Information.requests@ofcom.org.uk

20 April 2023

Freedom of Information: Right to know request

Thank you for your request for information as set out below. We received this request on 13 February 2023 and have considered it under the Freedom of Information Act 2000 ("the FOI Act"). We contacted you on 13 March 2023 to say we needed more time to consider the public interest in releasing or withholding the information requested - we have now concluded our consideration.

Your request

Please could you provide me with any notes or correspondence discussing and implementing the 'addendum' to C4's NED contracts you sent out in a previous response?

Could you please also inform me when this addendum was first introduced?

We wrote to you on 13 March to explain that the date of the addendum was 19 July 2022. You responded to us and in this response, you requested: *"please ensure you provide copies of correspondence implementing the addendum on 19th July."*

Our response

We can confirm that we hold information within the scope of your request. Some of this information has already been disclosed under this FOI response: [FOI response: Reference: 01559526](#). The additional information being disclosed is:

1. Internal email chain re the addendum, 31 May to 8 June 2022
2. Internal email chain re the addendum, 9 June and 14 June 2022
3. Email chain re the addendum, 17 June to 28 June 2022
4. Email chain re the addendum, 17 June to 28 June 2022 continued.

The rest of the information in scope of your request is being withheld as it is exempt from disclosure under sections 36, 40, 42 or/and 44 of the FOI Act – we set out these provisions below.

Some of the information in scope of your request contains working-level documents or discussions including exchanges of views and provision of advice between Ofcom colleagues and between Ofcom and government. Section 36(2)(b)(i) & (ii) and (c) of the FOI Act provides that that

information held by a public authority is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure of the information:

- would, or would be likely to, inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation, or
- would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36 is a qualified exemption, which means that Ofcom is required to consider whether or not the public interest in disclosing the information you have requested outweighs the public interest in withholding the information. In this case, we consider that the public interest favours withholding the information for the reasons set out in **Annex B** to this letter. In **Annex A** of this letter, the qualified person, the Group Corporate Director for Ofcom, has confirmed that the exemption applies.

In addition, most of the documents contain information which relates to a business, Channel 4, that we obtained while performing our functions under the Communications Act 2003 and Broadcasting Act 1990. We consider that disclosure of this information is exempt under section 44(1) of the FOI Act. Section 44(1) of the Act provides that information is exempt from disclosure if its disclosure is prohibited by or under any enactment. The enactment that prohibits the disclosure of this information is section 393(1) of the Communications Act 2003 (the Communications Act). Under this section, we are prohibited from disclosing information with respect to a particular business that has been obtained in the exercise of our regulatory functions, unless that business consents or one of the statutory gateways under section 393(2) under the Communications Act is met, neither of which apply here¹. Section 44 of the FOI Act is an absolute exemption and therefore is not subject to a public interest test.

We consider that some information falls under the exemption in section 42 of the FOI Act. This deals with the exemption of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. In applying this exemption, we have had to balance the public interest in withholding the information against the public interest in disclosing the information. The attached Annex C to this letter sets out the exemption in full, as well as the factors Ofcom considered when deciding where the public interest lay.

Some of the information captured by the request contains personal information and we have withheld this from disclosure where appropriate to do so. We consider that this information is exempt from disclosure under section 40(2) of the FOI Act, which provides that personal information about persons other than the requester is exempt where, among other things, its disclosure would contravene any of the data protection principles in the UK General Data Protection Regulation and the Data Protection Act 2018. This includes the principle that personal data must be processed fairly and lawfully. Section 40 is an absolute exemption under the Act and does not require a public interest test.

¹ The full provision can be found here: [Communications Act 2003 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2003/21/section/44)

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

Yours sincerely,

Information Requests

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.

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. Further information about this, and the internal review process can be found on the Information Commissioner's Office [here](#). Alternatively, the Information Commissioner can be contacted at:

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

Annex A

Section 36 exemption

The information we hold that falls within the scope of your request is being withheld as it falls under the exemption in section 36 of the Freedom of Information Act 2000 (the Act). I am a "qualified person" as referred to section 36(2) of the Act 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, inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation, and would otherwise, or would be likely otherwise to, prejudice the effective conduct of public affairs. 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.

Signed Melissa Tatton

Date: 19 April 2023

Group Corporate Director

Annex B

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
- otherwise 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.
- In this case, it is considered that disclosure would inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation and otherwise prejudice the effective conduct of public affairs.
- The application of section 36 is subject to a public interest balancing test.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none">• There is a general desirability that Ofcom's activities as the UK's communications regulator are transparent. Especially transparency of Ofcom's engagement with external stakeholders such as government departments, on areas that we regulate. This may lead to greater awareness of, and trust in, how Ofcom operates as a regulator and how it performs its role in relation to Channel 4.• Ofcom recognises that regulation of Channel 4 is a matter of interest to the public and releasing information relating to the addendum to the Channel 4 Board member's appointment letters	<ul style="list-style-type: none">• In order for Ofcom to carry out its functions as a regulator, colleagues need to be able to engage internally and externally in frank discussions and exchange advice/opinions/recommendations, in order deliberate and make robust decisions. The disclosure of information about such discussions would have a chilling effect as this would or would be likely to inhibit free and frank discussions in the future and this in turn would damage the quality of advice and deliberation and lead to less robust decision making.• In general, there is a need for Ofcom and DCMS officials to engage in discussions about Ofcom's role, including its functions in relation to Channel 4 and to release this information would likely affect future discussions as these would be less candid and this would harm

<p>could be said to facilitate and allow for discussion in a public forum.</p>	<p>Ofcom's and DCMS's ability to perform their respective roles effectively.</p> <ul style="list-style-type: none"> Releasing such information to the public about these discussions, would not only inhibit the free and frank exchange of views internally and externally with Government, but could impact Ofcom's working relationship with Government and in turn affect Ofcom's ability to provide input to, and received input from, Government regarding matters that affect the areas Ofcom regulate such as Channel 4. This would prejudice the effective conduct of Ofcom's role as the communications regulator. It would also likely inhibit Ofcom's ability to work in a collaborative way in the future with external stakeholders, including Government, should it be the case that such discussions would be made public.
<p>Reasons why the public interest favours withholding information</p>	
<p>The information we have disclosed under this request and that which is available in the public domain (see below) should provide the public with a general understanding of the clarification made to the Channel 4 NED appointment letters via the addendum, and an understanding of what our role generally is in relation to Channel 4, in order to facilitate discussion.</p> <ul style="list-style-type: none"> Some information about the addendum is publicly available online here: FOI response ref: 01549563 and FOI response ref: 01559526. Also further information about our regulation of Channel 4 generally is available here: Channel 4 Schedule 9 Arrangements (and Schedule 9 to the Communications Act 2003), Section 23 of the Broadcasting Act 1990 and Schedule 3 to the Broadcasting Act 1990. <p>In light of this we consider that the importance of transparency in relation to the remainder of the information is outweighed by the need for Ofcom to effectively engage internally and externally on matters relating to the areas we regulate. We continue to regulate Channel 4 and would need to consult and engage with DCMS in some instances, and have the ability to freely communicate internally, in order to perform our functions. We consider that disclosure of the information would likely result in colleagues being less open and thorough in their assessments which would lead to less robust decisions. Disclosure of the information would also affect our working relationships with stakeholders and lead to less collaborative working. Therefore, we consider that to disclose this information would or would likely have a knock-on effect on how we carry out our functions.</p>	

We consider that, on balance, it is in the public interest to withhold disclosure of some of the documents.

Annex C

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

- Open policy making and public confidence in regulated activities.

Factors for withholding

- 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 Ofcom's own salaried in-house legal advisers and is connected with the giving or obtaining of legal advice.

Reasons why the public interest favours withholding information

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.

Legal advice cannot be effectively obtained unless Ofcom is able to put all the facts before its in-house 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.