

Reference: 2015298

Information Requests
information.requests@ofcom.org.uk

15 July 2025

Freedom of Information request: Right to know request

Thank you for your request for information about the Committee of Advertising Practice's ('CAP') second consultation document.

We received your request on 17 June 2025 and we have considered your request under the Freedom of Information Act 2000 ("the FOI Act").

Your request

We submit the following requests for information:

- 1. Assuming it has been disclosed to Ofcom by ASA and/or CAP, please provide the full legal advice referred to in CAP's Second Consultation Document, as well as any other legal advice disclosed by CAP and/or ASA to Ofcom. We emphasise that there is no defensible claim to legal privilege over the advice because confidentiality over the advice was clearly waived when the legal advice was referred to and extensively summarised in the Second Consultation Document, and further waived by being shared with the ASA and/or Ofcom and/or the Department for Health and Social Care.*
- 2. Disclose Ofcom's communications with ASA and/or CAP and/or the Department for Health and Social Care (including any Ministers and/or their staff or officials) relating to the decision to abandon the Second Consultation.*
- 3. Disclose representations or communications presented to Ofcom (whether directly or indirectly) by any party advocating for the abandonment of the Second Consultation, or for the abandonment of CAP's proposals to restrict "brand advertising", including any legal correspondence.*

By "communications", we mean all emails, word processed documents, file notes, minutes of meetings, handwritten notes, recordings of phone calls, recordings or transcripts of Skype/Webex/Zoom/Teams calls, Skype/Webex/Zoom/Teams conference calls, Microsoft Teams messages, WhatsApp/SMS or other messaging application data, letters in hard copy or electronic form and any other informal communication platforms commonly used by Ofcom. Relevant emails are to include live and archived material in Mimecast or other relevant storage facilities. Please note that reference to archived material includes any deleted correspondence and emails.

Our response

Under the Communications Act 2003, Ofcom is the statutory regulator with responsibility for implementing and enforcing new restrictions on the advertising of less healthy food and drink ("LHF") products on TV, on-demand programme services ("ODPS") and in paid-for space online. For

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TV and ODPS, Ofcom has confirmed that the existing co-regulatory arrangements apply. The Advertising Standards Authority (“ASA”) will act as frontline regulator for the restrictions in these media. In addition, Ofcom has designated the ASA as a co-regulator in relation to the online restrictions.

On behalf of the ASA, the Committees of Advertising Practice (“CAP”) consulted on rules and guidance to implement provisions in the Communications Act 2003 which will, from January 2026, restrict adverts for “identifiable” LHF products in certain circumstances. The consultation closed on 7 February 2024. On 13 January 2025 CAP published an update explaining, in summary, that in the light of consultation responses and further legal advice around ‘brand advertising’ there would be a further consultation on revised guidance. This further consultation was published on 18 February 2025 and closed on 18 March 2025.

On 22 May 2025 the Government issued a ministerial statement signalling its intent to further legislate in relation to the restrictions on advertising of LHF products. On 11 June 2025, the ASA asked CAP to place on hold its ongoing consultation process, so as to allow for a proper assessment of the implications of the Government’s decision, as further detail becomes available.

- 1. Assuming it has been disclosed to Ofcom by ASA and/or CAP, please provide the full legal advice referred to in CAP’s Second Consultation Document, as well as any other legal advice disclosed by CAP and/or ASA to Ofcom. We emphasise that there is no defensible claim to legal privilege over the advice because confidentiality over the advice was clearly waived when the legal advice was referred to and extensively summarised in the Second Consultation Document, and further waived by being shared with the ASA and/or Ofcom and/or the Department for Health and Social Care.*

We are unable to disclose the information requested under question (1) as it 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. 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.

- 2. Disclose Ofcom’s communications with ASA and/or CAP and/or the Department for Health and Social Care (including any Ministers and/or their staff or officials) relating to the decision to abandon the Second Consultation.*

We hold some information in response to question (2), however we consider it is exempt from disclosure under section 36 of the FOI Act. In particular, sections 36(2)(b)(ii) and (c) of the FOI Act provide 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 exchange of views for the purposes of deliberation, or
- Would otherwise prejudice, or would be likely to 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 Corporation Secretary for Ofcom, has confirmed that the exemption applies.

3. *Disclose representations or communications presented to Ofcom (whether directly or indirectly) by any party advocating for the abandonment of the Second Consultation, or for the abandonment of CAP's proposals to restrict "brand advertising", including any legal correspondence.*

Please find attached with this letter two documents in scope of this question: a joint letter to Ofcom's Chief Executive attaching a legal opinion. The legal opinion is not subject to legal professional privilege. To be helpful, we have also included Ofcom's response to those documents. Personal information has been redacted pursuant to Section 40 of the FOI Act which relates to personal information, and which provides that such information is exempt from disclosure for the purposes of the FOI Act. Section 40 is an absolute exemption under the FOI Act and does not require a public interest test.

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

Annex A

Freedom of Information: Right to know request

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 FOI Act). I am a "qualified person" as referred to section 36(2) of the FOI Act and duly authorised by a Minister of the Crown for the purposes of that section. The limbs of section 36 that apply here are:

- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - (b) would, or would be likely to, inhibit—
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

In my reasonable opinion, section 36 of the FOI Act is engaged.

I have set out in Annex B the exemption in full, as well as the factors considered when deciding where the public interest lay in relation to the information concerned.

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

Signed: Corporation Secretary

Date: 15 July 2025

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 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 citizens being confident that decisions are taken on the basis of the best available information.• Knowledge that the arguments relating to a debate will be disclosable may improve the quality of those arguments.• Understanding the reasons for decisions made by CAP.	<ul style="list-style-type: none">• Ofcom and the ASA are in a co-regulatory arrangement. The effective operation of that arrangement requires close cooperation between Ofcom and the ASA/CAP. Such close cooperation is essential, for example, in order for the organisations to coordinate effectively with stakeholders and to develop approaches to policy matters that effectively utilise the expertise and information available to each body. This cooperation results in a regime which works effectively for consumers.• The matters in issue are the subject of an ongoing process. Publication of deliberative discussions could prejudice the outcome of that process.

Reasons why public interest favours withholding information

The public interest in disclosure in this case is significantly limited by the fact that there is an ongoing process. The reasons for putting the consultation on hold are set out in CAP's statement of 11 June 2025. The public interest against disclosing is strong as the publication of information of this kind, involving the close cooperation between co-regulators for the purposes of preparing for the implementation of new restrictions on advertising, would be likely to significantly affect the future course of that close cooperation, rendering it less efficient and effective. Publication could also prejudice the outcome of an ongoing process.

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	Factors for withholding
<ul style="list-style-type: none"> • Open policy making and public confidence in regulated activities. 	<ul style="list-style-type: none"> • Ofcom considers the request for legal advice is a request for information of which a claim to legal professional privilege could be maintained in legal proceedings. The advice held by Ofcom was obtained by the ASA and shared with Ofcom on a strictly confidential basis given the ASA and Ofcom’s common interest in the implementation of the prohibitions on the advertising of less healthy foods.
Reasons why public interest favours withholding information	
<ul style="list-style-type: none"> • It is Ofcom’s position that legal privilege still applies to this document. The public interest argument for disclosure is limited. An explanation has already been provided as to the high-level effect of the advice. 	

Request an internal review

If you are unhappy with the response you have received to your request for information, or think that your request was refused without a reason valid under the law, you may ask for an internal review. If you do, it will be subject to an independent review within Ofcom. We will either uphold the original decision, or reverse or modify it.

If you would like to ask us to carry out an internal review, you should get in touch within two months of the date of this letter. There is no statutory deadline for us to complete our internal review, and the time it takes will depend on the complexity of the request. But we will try to complete the review within 20 working days (or no more than 40 working days in exceptional cases) and keep you informed of our progress. Please email the Information Requests team (information.requests@ofcom.org.uk) to request an internal review.

Taking it further

If you are unhappy with the outcome of our internal review, then you have the right to [complain to the Information Commissioner’s Office](#).