

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 January 2012

**Public Authority:** Office of Communications  
**Address:** Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA

### Decision

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1. The complainant requested information about complaints that were made to the Office of Communications (Ofcom) about certain adult broadcasts.
2. The Information Commissioner's decision is that Ofcom correctly applied section 44(1)(a) of the FOIA (prohibited from disclosure under any enactment) to the requested information with one exception. This relates to the wording of a complaint made by an individual concerning a programme broadcast by a business that had been dissolved at the time of the request. In relation to this information the Information Commissioner (the Commissioner) considers that Ofcom incorrectly applied section 44(1)(a) and section 41(1) of the FOIA (information provided in confidence).
3. The Commissioner requires Ofcom to take the following steps to ensure compliance with the legislation.
  - Provide the requester with the wording of the complaint made by an individual concerning a programme broadcast by the business that had been dissolved at the time of the request.
4. Ofcom must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 27 April 2011 the complainant wrote to Ofcom and requested

*'...details of complaints made against so-called "Babes" channels that were found in breach and published in Ofcom Broadcasts Bulletins nos 144 to 154 inclusive.*

*The information required is as: the original wording of each complaint, the nature of the complainant (member of public, internal monitoring, competitor complaint, or whatever categories you use), the gender of the complainant, their address (with street number or house name removed, but retaining street and full postcode), their email provider name (address after the @ sign), IP address (with last 4 digits obscured), time of the complaint, telephone number (with last 4 digits obscured) and an outline of communication that would indicate that the contact details were genuine or false (email sent and responded to, email returned address not known, that sort of thing). Also please indicate where more than one complaint has come from the same person, your reports imply this has happened at least two times.*

*It is my belief that the information requested will not be sufficient to identify any individual but would help to indicate the diversity of complaints about this sector.*

*The broadcasts that I have identified in the short survey period follows...:'*

The complainant then gave details of 35 separate broadcasts.

6. Ofcom received the request on the same day and responded on 24 June 2011. It disclosed some of the requested information and stated that the remaining information was exempt from disclosure under section 40(2) and section 44(1)(a) of the FOIA.
7. Following an internal review Ofcom disclosed some further information and upheld its decision to apply section 40(2) and section 44(1)(a) to the remaining information.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to address whether Ofcom:

- should provide him with an indication of which complaints were made by the same complainant(s);
  - was entitled to refuse to provide the original wording of complaints made about broadcasts by individuals and businesses; and
  - was entitled to refuse the outgoing postcodes for the businesses that made complaints.
9. The complainant does not dispute Ofcom's application of section 40(2) of the FOIA.
10. During the course of the Commissioner's investigation Ofcom provided the complainant with an indication of which complaints were made by the same complainant(s).
11. The Commissioner has therefore considered whether Ofcom was entitled to refuse to provide the wording of complaints and the outgoing postcodes (that is, the first part of the postcodes) of the businesses that made complaints (the disputed information) under section 44(1)(a) of the FOIA. He has also considered whether Ofcom was entitled to refuse to provide the wording of complaints made by individuals under section 44(1)(a) of the FOIA.
12. In the course of the Commissioner's investigation Ofcom argued that section 41(1) of the FOIA applied to the wording of one complaint made to Ofcom by an individual. The Commissioner has considered this as part of his investigation.
13. The Commissioner has considered all of the arguments made by the complainant and Ofcom including those not specifically referenced within this decision notice.

## **Reasons for decision**

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### **Section 44(1)(a) of the FOIA**

14. Section 44(1)(a) of the FOIA states that information is exempt if its disclosure is prohibited by or under any enactment.
15. Ofcom has argued that it is prohibited from disclosing the disputed information by section 393(1) of the Communications Act 2003 (CA 2003), which states:

***'393 General restrictions on disclosure of information***

*(1) Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by—*

- (a) this Act,*
- (b) [...]1*
- (c) the 1990 Act, or*
- (d) the 1996 Act,*

*is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.'*

16. In order to determine whether the statutory prohibition under section 393 of the CA 2003 applies the Commissioner has considered the following:

- Is the disputed information with respect to a particular business?
- Do the businesses to which the disputed information relates continue to be carried on?
- Was the disputed information obtained in exercise of a power contained in the CA 2003, the Broadcasting Act 1990, or the Broadcasting Act 1996?
- Does Ofcom have the consent of any of the businesses concerned to disclose the disputed information?
- Do any of the exceptions that disapply section 393(1) of the CA 2003, as outlined in section 393(2) of the CA 2003, apply to the disputed information?

### **Is the disputed information with respect to a particular business?**

17. The disputed information can be grouped into two categories. Firstly, it includes the wording of complaints made about programmes broadcast by particular businesses. This includes complaints made by both individuals and businesses. Secondly, the disputed information includes the outgoing postcodes for the businesses that have made complaints about programmes broadcast by other businesses.

18. The wording of each complaint describes the content of the programme and the reasons for the complaint. Based on this information Ofcom takes steps to investigate the complaint about the business concerned. This is the case whether the complaint is made by an individual or by another business. The Commissioner considers that the wording of complaints about particular programmes is clearly information with respect to the business that broadcast that programme.

19. Ofcom has also argued that an outgoing postcode of a business that made a complaint is information with respect to that particular business. The complainant has argued that even the smallest outgoing postcode would contain many businesses and that this information would not identify the business concerned.
20. The Commissioner does not consider that whether a particular business could be identified by the outgoing postcode is a relative consideration in determining whether the information is with respect to a particular business and covered by section 393(1) of the CA 2003. He considers that an address provided by a business when it makes a complaint to Ofcom is information with respect to that particular business. Therefore, any part of that address, including the outgoing postcode, is information that was provided to Ofcom with respect to a particular business.
21. On this basis the Commissioner considers that all of the disputed information is with respect to particular businesses.

**Do the businesses to which the disputed information relates continue to be carried on?**

22. Ofcom has informed the Commissioner that it has checked the records of Companies House and, with one exception, all of the businesses that made complaints and all of the businesses that were subject to complaints continue to be carried on.
23. The exception relates to one business which was subject to a complaint by an individual and had been dissolved at the time of the request. Having determined that the business had been dissolved Ofcom withdrew its reliance on section 44(1)(a) of the FOIA and sought to rely on section 41(1) of the FOIA to refuse to disclose the wording of the complaint about the dissolved business. This is addressed below.
24. The Commissioner is satisfied that the remaining disputed information relates to businesses that continue to be carried on.

**Was the disputed information obtained in exercise of a power conferred by the CA 2003, the Broadcasting Act 1990, or the Broadcasting Act 1996?**

25. Ofcom has explained that it has general duties in relation to broadcasting. Under section 3(2)(e) of the CA 2003 this includes:

*'the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services.'*

26. Ofcom also has duties under section 319 of the CA 2003 to set such standards for the content of television and radio programmes which appear to Ofcom to be prudent to secure the standard objectives set out under section 319(2) of the CA 2003. These objectives include:

*'(a) that persons under the age of eighteen are protected; [...]*

*(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.'*

27. Ofcom has stated that the disputed information was 'obtained' by virtue of its powers under section 325 of the CA 2003. This requires Ofcom to establish procedures for the handling and resolution of complaints about the observance of standards established under section 319 of the CA 2003. Broadcasters are required by the terms of their licenses to observe those standards in the provision of their services.

28. Ofcom has argued that 'obtained' under section 393(1) of the CA 2003 should be interpreted broadly to include not only information Ofcom has requested, or used a power to obtain, but also to include information submitted to it for the purposes of it undertaking its functions. The complainant considers that section 393(1) of the CA 2003 is only intended to apply to information Ofcom obtains from organisations on demand in the exercise of its powers.

29. The Commissioner is satisfied that the disputed information was obtained by Ofcom in the exercise of its powers conferred by the CA 2003. He considers that the term '*obtained in exercise of a power*' under section 393(1) of the CA 2003 should be interpreted widely and should not be limited to information Ofcom has obtained on demand in the exercise of its powers. He considers that section 393(1) of the CA 2003 covers information obtained by Ofcom for the purposes of receiving, considering and responding to complaints by individuals and businesses relating to its functions under the CA 2003. This includes the outgoing postcodes of the businesses that made complaints.

**Does Ofcom have the consent of any of the businesses concerned to release the disputed information?**

30. Ofcom has stated that it does not have the consent of any of the businesses to which the disputed information relates to disclose any of the disputed information. This includes the businesses that made complaints and the businesses that were subject to the complaints.

31. Ofcom has not sought consent from any of the businesses concerned. It has argued that it is reasonable in the circumstances to assume that the

businesses concerned would not provide their consent. Ofcom has also explained that all of the businesses that made complaints asked that their names and addresses were not disclosed.

32. In the Commissioner's view Ofcom is under no obligation under the CA 2003 to seek the consent of the businesses concerned to disclose the disputed information. He considers that it is reasonable in all of the circumstances to assume that those businesses subject to the complaints, and those businesses that made complaints and asked for their details not to be disclosed, would not give their consent for the disputed information to be disclosed.

**Do any of the exceptions that disapply section 393(1) of the CA 2003, as outlined in section 393(2) of the CA 2003, apply to the disputed information?**

33. The Commissioner has also considered whether the statutory prohibition on disclosing the disputed information is disappplied by any of the exceptions under section 393(2) of the CA 2003. The Commissioner considers that the only potentially relevant exception is under section 393(2)(a) of the CA 2003, which states:

*'(2) Subsection (1) does not apply to any disclosure of information which is made—*

*(a) for the purpose of facilitating the carrying out by OFCOM of any of their functions.'*

34. The Commissioner asked Ofcom whether it considered that disclosing the disputed information would facilitate the carrying out of any of its functions. Ofcom has argued that in the course of considering any complaint it receives in connection with section 325 of the CA 2003 it takes a view as to whether or not certain information should be disclosed in order for it to ascertain the views of the affected parties and come to a view as to the appropriate way of resolving the matter. It stated that as a matter of course it only discloses a basic summary of the complaint to the business that is subject to the complaint. It went on to state that Ofcom has, therefore, already taken a view as to the information that is appropriate for it to disclose for the purposes of facilitating its functions under section 393(2) of the CA 2003 and that it did not consider it necessary for the disputed information to be disclosed in order for it to carry out its functions.
35. Ofcom also noted the Commissioner's previous decision notice under case reference FS50187452, which stated:

*'compliance with the Freedom of Information Act is a duty imposed upon public authorities but is not a function for the purpose of 393(2)'.*

36. The complainant has argued that Ofcom discloses information in its broadcast bulletins when it so chooses and that on occasion this includes direct quotes from the complaints it receives.
37. The Commissioner notes that the exception in section 393(2)(a) of the CA 2003 applies to *'any disclosure'* made for the purposes of carrying out any of Ofcom's functions. In the Commissioner's view Ofcom must assess whether each disclosure of information is made to facilitate its functions, regardless of whether the information has been disclosed previously under section 393(2)(a) of the CA 2003. Therefore, whether Ofcom has made a previous decision to disclose the disputed information for the purposes of one of its functions is not a relevant consideration when determining whether the exception under section 393(2)(a) of the CA 2003 applies to each disclosure of information into the public domain under the FOIA.
38. The Commissioner's view is that the FOIA is not a relevant function for the purposes of section 393(2)(a) of the CA 2003. He is also satisfied that Ofcom's opinion, that disclosing the disputed information in this instance would not facilitate the carrying out of any of its functions, is reasonable in all circumstances. However, as outlined above, he reaches the conclusion that the exception under section 393(2)(a) of the CA 2003 does not apply in this case for different reasons to those relied on by Ofcom. He also considers that it would be open to Ofcom to decide that, in any given case, disclosure of information under the FOIA would facilitate one of its functions and rely on section 393(2)(a) of the CA 2003 to disclose the information.
39. The Commissioner considers that the statutory prohibition preventing Ofcom from disclosing information under section 393(1) of the CA 2003 applies to the disputed information, with the exception of the information relating to the dissolved business. Consequently, he is satisfied that Ofcom correctly applied section 44(1)(a) of the FOIA to the majority of the disputed information.

### **Section 41(1) of the FOIA**

40. The statutory prohibition under section 393(1) of the CA 2003 can only apply to information *'with respect to a particular business...so long as that business continues to be carried on'*. As one of the businesses to which the disputed information relates had been dissolved at the time of the request, the statutory prohibition no longer applies to the disclosure of this information. Therefore, section 44(1)(a) of the FOIA is not



engaged. The information which is not covered by the statutory prohibition is the wording of a complaint made by an individual about a programme broadcast by the dissolved business. Ofcom has argued that section 41(1) of the FOIA applies to this information.

41. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from another person and the disclosure of the information to the public would constitute an actionable breach of confidence.

42. Ofcom has explained that when an individual makes a complaint they are asked whether or not they consent to their contact details and the details of their complaint being shared with the broadcaster concerned. Ofcom's online complaint form stated the following at the time the individual made the complaint:

*'Please untick this box if there are circumstances (e.g. risk of harm or damage) why your contact and/or complaint details should NOT be disclosed to the broadcaster and we will contact you to discuss your concerns. If we are unable to contact you - or if you do not give your consent - we will not pass your contact details to the broadcaster. Instead, in order to investigate your complaint, we may summarise your complaint and send that summary to the broadcaster for comment.'*

43. Ofcom has stated that the individual that made the complaint about the dissolved business removed the tick to indicate that they did not want their details to be passed to the broadcaster. Ofcom has argued that the information was provided in confidence and that it was reasonable for the individual to expect that Ofcom would not disclose his information to the broadcaster or to any third parties.

44. The wording of the complaint made to Ofcom describes a programme broadcast by the dissolved business which contained adult content. It also describes the nature of the complaint and the complainant's disapproval of its content. Ofcom has disclosed the following information about the complaint to the requester:

- the complaint was made by an individual;
- the individual's gender;
- the individual's outgoing postcode; and
- the provider of the email service the individual used to make the complaint.

The only information that remains in dispute is the wording of the complaint.

45. The Commissioner considers that the wording of the complaint was information obtained by Ofcom from the complainant. He will now go on to consider whether disclosure of the information by Ofcom would constitute an actionable breach of confidence.
46. The Commissioner recognises that the complainant indicated that he did not want the details of his complaint to be disclosed. However, he also notes that at the time of the complaint Ofcom's complaints form did not provide separate options for an individual to specify whether they only objected to their contact details being disclosed or whether they also objected to the wording of their complaint being disclosed. It was also clear from the online complaints form that where an individual indicated that they did not want their 'contact and/or complaint details' to be disclosed, Ofcom may still send a summary of the complaint to the broadcaster. The Commissioner does not consider that an individual's indication that they did not want their 'contact and/or complaint details' to be disclosed is determinative of whether the wording of the complaint has the necessary quality of confidence.
47. Having considered the wording of the complaint and the information that has already been disclosed, the Commissioner does not consider that disclosing the information would allow the complainant to be identified. The Commissioner recognises that the original complaint to Ofcom, including the complainant's contact details, would have the necessary quality of confidence. However, this is not what has been requested. As the wording of the complaint does not include any information that would lead to the identification of the complainant, the Commissioner considers that it does not have the necessary quality of confidence.
48. The Commissioner also considers that the complainant's reasonable expectation of confidence in this case would be that Ofcom would not disclose the fact that he made the complaint. As the complainant is not identifiable from the requested information together with the information Ofcom has already disclosed, there can be no detriment or loss of privacy to the complainant resulting from Ofcom's disclosure of the wording of the complaint.
49. As the Commissioner considers that the requested information does not have the necessary quality of confidence, and that there would be no detriment or loss of privacy to the complainant if the information was disclosed, it follows that there can be no actionable breach of confidence resulting from Ofcom's disclosure of the information. Therefore, section 41(1) of the FOIA is not engaged and Ofcom should disclose the wording of the complaint made by an individual about a programme broadcast by the business that had been dissolved at the time of the request.

## Other matters

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50. Ofcom responded to the complainant's request on the fortieth working day following receipt. The Commissioner considers that Ofcom was in breach of section 10(1) of the FOIA to the extent that it did not provide the information it was obliged to provide within 20 working days. He also considers that Ofcom was in breach of section 17(1) of the FOIA for failing to issue a refusal notice in relation to the exempt information within 20 working days.

## Right of appeal

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51. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

52. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Faye Spencer**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**