

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2022

Public Authority: Ofcom
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Decision (including any steps ordered)

1. The complainant made a request for information relating to Kevin Bakhurst, Director of Ofcom and a potential role at the BBC. Ofcom refused to confirm or deny whether the requested information was held under section 40(5B)(a)(i) FOIA. The Commissioner considers that Ofcom incorrectly applied section 40(5B)(a)(i) FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, which must confirm or deny whether the requested information is held, and either disclose the requested information or issue a valid refusal notice compliant with section 17 of the FOIA.
3. The public authority 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 9 December 2021 the complainant made the following request for information under the FOIA for:

"(a) All information relating to or comprising any notification by Mr Kevin Bakhurst to the Board, the Chief Executive, the Corporation Secretary, any Senior People Business Partner (as such term is used at paragraph 2.3 of the Ofcom "Colleague Conflict of Interests Policy", version 3 of which was published on February 2021) or the People and Transformation Director, of any conflict of interest (or of any circumstances where Mr Bakhurst believed that there was a risk of a conflict of interests) arising from the possibility, or any conversations pertaining to the possibility, of him applying for or being offered a senior role by the BBC (and for which he was according to media reports, being considered). If you believe a narrower group would be a better place to look, in line with your Section 16 obligation, please do that.

(b) By way of a letter dated 26 November 2021 from [name redacted] to this firm, [name redacted] wrote that "we were, and remain, satisfied that no conflict of interest has arisen in relation to Mr Bakhurst and the BBC role in question." Please would you confirm the steps taken, and provide copies of any notes, minutes, memoranda or other internal or external communications relating to the decision-making process that led to that satisfaction that there was no conflict of interest and any information relating to the final determination of such satisfaction at the time of disclosure and in response to our letter of 19 November 2021, as confirmed in [name redacted] letter of 26 November 2021 at the time of disclosure by Mr Bakhurst to Ofcom.

(c) All information held relating to any and all contact(s) between Mr Bakhurst and the BBC (directly or indirectly) relating to his potential employment (or the possibility of his potential employment) as Head of News or in any other senior BBC post, including information as to whether Mr Bakhurst applied for the Head of News (or any other) role at the BBC, had any conversations with the BBC (or any person acting on behalf of the BBC) in any way whatsoever concerning any such role and/or the potential of applying for any such role, or was approached in any way whatsoever by or on behalf of the BBC concerning any such role and/or the potential of applying for any such role.

(d) All information relating to Mr Bakhurst applying for, or being considered for, or contained in any discussions or conversations or notes of discussions or conversations about his, potential employment with the BBC.

(e) All information held concerning and/or comprising any action taken by Ofcom to ensure its independence and compliance with the Board Code of Conduct and schedule 1, paragraph 17 of the Ofcom Act 2002 in relation to the possible appointment of Mr Bakhurst to a senior role at the BBC."

5. On 19 January 2022 Ofcom responded. It refused to confirm or deny whether it held the requested information but did not cite which exemption it was relying upon.
6. The complainant requested an internal review on 24 January 2022. Ofcom sent the outcome of its internal review on 15 February 2022. It upheld its original position, refusing to confirm or deny whether it holds the requested information citing section 40(5B)(a)(i) FOIA.

Scope of the case

7. The complainant contacted the Commissioner to investigate whether the exemption cited had been correctly applied in this case.
8. The Commissioner has considered whether Ofcom was correct to refuse to confirm or deny whether the requested information was held under section 40(5B)(a)(i) FOIA.

Reasons for decision

Section 40 - personal information

9. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
10. Therefore, for Ofcom to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;
and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

11. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

13. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

14. In this case Ofcom has argued that confirming or denying whether the requested information was held would disclose whether or not Kevin Bakhurst had applied for a role at the BBC which is information relating to an identifiable individual.

15. The Commissioner is satisfied that if Ofcom confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.

16. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent Ofcom from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

17. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

18. Article 5(1)(a) UK GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"

19. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so

would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

20. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

21. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

22. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

(ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

23. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) *Legitimate interests*

24. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

25. The complainant considers that given Kevin Bakhurst's role as Director of Ofcom, this provides a compelling and legitimate public interest in disclosure of information if he was in correspondence with the BBC regarding a potential role due to allegations of improper influence. This is because of the data subject's current position with the BBC's regulator.

26. Ofcom does not consider that there is a legitimate interest in confirming or denying whether the requested information is held in this case.

27. The Commissioner considers that there is a legitimate interest in the public being informed of potential applicants and their backgrounds for such a high profile role.

(ii) *Is confirming whether or not the requested information is held necessary?*

28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested

information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

29. If there was found to be a legitimate interest in confirming or denying whether the requested information is held in this case, Ofcom does not consider this would be necessary. This is because it operates a clear and effective conflicts of interest policy to address any such allegations made.
30. The Commissioner considers that confirmation or denial would be necessary to meet the legitimate interest in the public understanding the background and identity of potential applicants for such a high profile role.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

31. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
32. In this case Ofcom explained that in relation to actual or potential job applications there is a strong expectation of privacy. Information concerning the handling of a person's career is clearly of a highly sensitive nature. Individuals are therefore entitled to expect that information of this nature will be kept private, subject to the proper handling of any conflict of interest. In the context of potential applications for jobs by members of Ofcom's senior management team, Ofcom's Conflict of Interest Policy provides that it is appreciated if notice can be provided about potential roles to help manage any perceptions of conflict while considering any prospective employment. It is provided at paragraph 2.17 that such information "will be held in the strictest confidence by the People and Transformation Director and/or the Chief Executive and will only be shared more widely if the risk is such that it warrants action to mitigate it. No detriment will follow as a result of this information being shared".
33. Paragraph 2.19 further provides that: "The People and Transformation team/others referred to in paragraphs 2.17 and 2.18 above, will maintain the confidentiality of the information you provide, unless the nature of the conflict(s) identified makes disclosure more widely

unavoidable. That would be discussed fully with you in advance". It therefore argued that the data subject has a reasonable expectation of privacy.

34. Ofcom explained that confirmation or denial would put into the public domain information about Kevin Bakhurst's career (whether he did or did not consider a role at the BBC) which would have the potential to distort the views of third parties, which may for example unfairly affect future opportunities.
35. It said that disclosure would also undermine the confidence in Ofcom's Conflict of Interest Policy, which would be detrimental to the public interest. The prospect of disclosure of such private information in response to press speculation would discourage colleagues from engaging in an open manner with the conflict of interest process.
36. The Commissioner accepts there are many circumstances in which a data subject would not expect information as to whether or not they had applied or considered applying for a specific job role to be disclosed into the public domain. However the Commissioner considers that the more senior an individual is and the more senior the role in question, it is more likely the data subject would have a reasonable expectation that a public authority may confirm or deny whether such information is held.
37. In this case the Commissioner is aware of various media reports dated prior to the request about potential contenders for the role of Director of BBC News.
38. The Commissioner's guidance on section 40 FOIA makes clear that the consequences of disclosure may be less serious if the same or similar information is already in the public domain. However it goes on to explain that where there has merely been public speculation about the information, for example on social media, or it has only appeared in a newspaper article, then the argument that it would be appropriate to disclose the same information under FOIA or the EIR will carry less weight than if it had been confirmed in an official source.
39. Whilst the media coverage (which is still currently available online) cannot be considered an official source, given the seniority of the role and the individual involved, the Commissioner considers that the data subject in this specific case would have a reasonable expectation that Ofcom may confirm or deny whether the requested information was held. As Kevin Bakhurst is currently Group Director for Broadcasting and Online Content at Ofcom, a public authority under FOIA, this individual will be aware of obligations to confirm or deny whether recorded information is held in response to FOIA requests.

40. Finally Ofcom's arguments regarding undermining confidence in its Conflict of Interest Policy is not relevant to balancing the legitimate interests and the interests of the data subject.
41. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would be lawful.

Fairness

42. Even if it has been demonstrated that confirming or denying whether the withheld information is held under FOIA would meet the condition for lawful processing under Article 6(1)(f) UK GDPR, it is still necessary to show that such a confirmation or denial would be fair and transparent under principle (a).
43. Under principle (a), the provision of confirmation or denial must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in the provision of confirmation or denial to the public.
44. In considering whether confirming whether or not the requested information is held is fair the Commissioner takes into account the following factors:
 - The data subject(s) reasonable expectations of what would happen to their information;
 - The consequences of providing confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - The balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.
45. The Commissioner considers that as disclosure passes the legitimate interest test in this case, disclosure will be fair for the same reasons.

Would confirming whether or not the information is held be transparent?

46. Under principle (a), confirming or denying whether the requested information is held must be transparent to the data subject.
47. In considering whether providing such a confirmation or denial would be transparent, the Commissioner takes into account what information Ofcom has provided to the data subject concerning the request. In this case Ofcom has sought the data subject's consent which was denied.

48. Ofcom should have explained in its privacy notices that it is subject to FOIA and the EIR and as explained above given the seniority of the data subject employed by a public authority they should be aware of Ofcom's duty to confirm or deny whether information is held in response to FOIA requests received, potentially relating to the individual in this case given their position.
49. Based on the above factors, the Commissioner has determined that confirming whether or not the requested information is held would be transparent.

The Commissioner's view

50. In this instance, the Commissioner has decided that Ofcom has failed to demonstrate that section 40(5B)(a)(i) is engaged.

Right of appeal

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: 0870 739 5836

Email: grc@Justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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.....

Gemma Garvey

Senior Case Officer

Information Commissioner's Office

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Cheshire

SK9 5AF