

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2015

Public Authority: Ofcom

Address: Riverside House, 2a Southwark Bridge Road
London SE1 9HA

Decision (including any steps ordered)

1. The complainant has requested information about '03' telephone number revenue sharing. Ofcom released some information and applied the FOIA exemptions under section 40 (personal data), 42 (legal professional privilege) and 44 (prohibitions on disclosure) to the information that it withheld. The complainant chose not to include in their complaint Ofcom's reliance on section 40 and 42 to aspects of the information that it withheld. The focus of this decision notice is therefore Ofcom's application of section 44 to particular elements of the withheld information.
2. The Commissioner's decision is that Ofcom has correctly applied section 44(1)(a) and he does not require Ofcom to take any further steps.

Request and response

3. On 14 July 2014, the complainant wrote to Ofcom and requested information in the following terms:

"The information requested is related to the consultation on 03 number revenue sharing found here:

<http://stakeholders.ofcom.org.uk/consultations/03-modification>

I am seeking information to establish the background behind the proposals and how Ofcom may have been influenced. I am therefore seeking the following information from Ofcom:

[1] Disclosure of the full data used, and the analysis carried out to quantify the magnitude of the perceived problem of direct and indirect revenue sharing on 03 numbers. Also, the sources of the data used,

when they were obtained, whether acquired directly or through third parties, and if acquired through third parties, the identity of individuals and/or organisations who supplied the data and/or carried out the analysis.

[2] Records and information Ofcom has with regard to service that it considers are directly or indirectly sharing revenue from 03 numbers.

[3] Disclosure of all communications Ofcom has made or received from UK mobile networks and fixed line networks in relation to services that it considers are, or possibly are directly or indirectly sharing revenue from 03 numbers.

[4] Disclosure of any meetings it has had regarding these matters with any of the aforementioned companies, including the venue, date, time, agenda and minutes. Also any formal or informal notes made or recorded at or in relation to these meetings."

4. Ofcom responded on 8 August. It said that it did not hold some of the information that had been requested but directed the complainant to a consultation document published online¹, where some information within the scope of their request is available. Ofcom released other information within the scope of the request and also withheld some. It applied section 40(2) to the names of external individuals and section 42 to information that it subsequently confirmed to the Commissioner is legal advice provided to it by its lawyers. Ofcom withheld other information using the provision under section 44.
5. The complainant was dissatisfied with Ofcom's application of section 44 to some of the information for two reasons. First, that it had withheld the names of the businesses with whom Ofcom had been in communication regarding reforms to 03 numbers, and the resulting correspondence. And second, that it had not released information related to services that Ofcom considers are directly or indirectly sharing revenue from 03 numbers (elements 2 – 4 of the request).
6. Following an internal review, Ofcom wrote to the complainant on 10 October. It released a small amount of additional information that it had previously withheld under section 44 for the reasons explained in

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/03-modification/summary/03-modification.pdf>

paragraph 12(It also applied section 40 to this information.). Ofcom explained why section 44 prevented it from releasing the names of the three businesses concerned without the consent of those businesses. Ofcom also said it had considered its response to elements 2 – 4 of the request and confirmed that it had included relevant and appropriate information (ie information not subject to an exemption) in the bundle of information it had already released to the complainant. Finally, it directed the complainant to where it had published its response to a similar, but separate, information request².

Scope of the case

7. The complainant contacted the Commissioner on 30 October to complain about the way their request for information had been handled. Specifically, they are not satisfied with Ofcom's application of section 44 to the information that is of particular interest to the complainant. Initially, they held the view that Ofcom may not have exercised any legal powers to obtain the information (as the mobile networks may have provided information to Ofcom voluntarily). However, during the investigation it became apparent that the complainant is particularly dissatisfied that Ofcom did not provide evidence of particular services it claims exist, in its consultation document on 03 numbers, and which it gives as a reason for the consultation.
8. The Commissioner has focussed his investigation on Ofcom's application of the section 44 exemption to some of the information it withheld.

Reasons for decision

9. **Section 44(1)(a)** of the FOIA says that information is exempt if its disclosure is prohibited by, or under, any enactment.
 10. The enactment Ofcom has cited in its correspondence with the complainant and the Commissioner is the Communications Act 2003 (CA2003). Ofcom says that section 393 (1) of this Act ('General
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² https://www.whatdotheyknow.com/request/consultation_on_revenue_sharing

restrictions on disclosure of information') prevents it from releasing information in respect of a particular business that it obtains in exercise of its powers under this Act (and other enactments), so long as the business continues to function, and without the consent of that business.

11. Section 393(2) provides a number of exceptions that disapply 393(1), of which the only one relevant is 393(2)(a). This allows (not compels) Ofcom to release information '*for the purpose of facilitating the carrying out by Ofcom of any of their functions*'.
12. The Commissioner notes that at internal review, Ofcom contacted the four businesses concerned - all of which continue to function - to see whether they consented to correspondence regarding the 03 number proposals being disclosed. One business did consent; the other three did not and it was on that basis that Ofcom released redacted information to the complainant.
13. In its submission to him, Ofcom confirmed that the information in question concerned the business of regulated companies and Ofcom received it in exercise of its function as a regulator. Ofcom explained that the specific legislative basis for the consultation to which the information relates, stems from sections 56 ('The National Telephone Numbering Plan') and 60 ('Modification of documents referred to in numbering conditions') of the CA2003.
14. The complainant considered that Ofcom may not have exercised any legal powers to obtain the information and, if not, this would negate its application of section 44. Ofcom has addressed this in its submission to the Commissioner through its discussion of the judgement of the First Tier Tribunal (FTT) in the case of *Mander Faw v ICO*. In this judgement, the FTT said the word 'obtained' used in section 393 is to be given its 'broad and natural meaning'. Ofcom took the view that this meaning could be applied to its correspondence with the four businesses in question and stressed to the Commissioner that it would not have received information about these businesses were it not for the duties and responsibilities that it has been given under the CA2003.
15. Having considered the views of both parties, the Commissioner is satisfied that Ofcom's position is correct. Irrespective of whether any or all of the information was voluntarily provided to Ofcom by any of the four businesses, Ofcom obtained the information as a result of the

regulatory powers provided to it in the CA2003. As such, the Commissioner agrees with Ofcom that it is prevented from disclosing the information without the consent of those businesses. One of the businesses gave consent, enabling Ofcom to release some information; however the three remaining businesses did not, and so Ofcom correctly withheld this element of the information.

16. As discussed at paragraph 11, section 393(2)(a) provides Ofcom with a gateway for the disclosing information. This gateway does not compel Ofcom to disclose information, but does *allow* it to do so for the purposes set out in this section. Ofcom has referred to two of the Commissioner's previous decisions: FS50187452 and FS50416106, in which the Commissioner set out that '*the Freedom of Information Act is a duty imposed upon public authorities but is not a function for the purpose of 303(2)*'. Consequently, Ofcom argues that disclosing the names and correspondence relating to the three businesses that have not consented to its release would also not facilitate its functions as a regulator. The Commissioner accepts this argument.
17. The Commissioner next considered the complainant's second concern; that Ofcom did not disclose details of, and evidence about, particular services it claims exist and which are the reason for its consultation on 03 numbers. The complainant has a particular interest in services that provided cash payments through the PayPal money transfer system; cash vouchers for purchases from the online retailer Amazon; credits to top up subscriber accounts; credits for making international phone calls and bitcoins. Ofcom refers to its concerns about the emergence of these services at §3.5 and §3.6 of its consultation document.
18. During the Commissioner's investigation, the complainant insisted that Ofcom should disclose the evidence it has used in relation to these services. The complainant argues that at least some of the evidence is likely to have been in the public domain and that, this being the case, Ofcom should disclose it to the complainant.
19. Ofcom confirmed more than once to the Commissioner that, having given it some consideration, it is satisfied with its response to the complainant. This is because it either released to the complainant all the related, appropriate, information it holds or directed them to where they can find other relevant information that is contained in the consultation material already published online. Ofcom also pointed out to the Commissioner that it did not undertake any greater analysis than that set out in the consultation document. Where Ofcom redacted or withheld some information, it explained that this information was exempt under section 44 for the reasons explained above and principally because it does not have permission from the businesses concerned to disclose any additional relevant information that it holds.

20. In its submission to the Commissioner, Ofcom said that the arguments it had provided in favour of withholding the information in question rely on the 'nature' of the information, rather than the 'content'. It did not therefore feel it was necessary to provide the Commissioner with the information that it had not already released (since the 'content' of information is not relevant to section 44 or section 393 of the CA2003).
21. The Commissioner's view is that the distinction between the content of information and the nature of information is very fine; doubt about its nature is likely to arise without its content having been examined. Where such doubt exists, the Commissioner is within his rights to demand to see the information and if necessary, to serve an Information Notice.
22. In this case, having had sight of Ofcom's response, internal review, the information it released to the complainant at internal review, and from the context of the request, the Commissioner is prepared to accept Ofcom's description of the nature of the withheld information. He is also prepared to accept that that the information in question is covered by a statutory bar and is therefore exempt from disclosure under section 44 of the FOIA.
23. To conclude, the Commissioner agrees with Ofcom's assessment of its handling of this request. He accepts the arguments Ofcom has presented in its submission to him and considers that Ofcom addressed all the elements of the request satisfactorily.

Right of appeal

24. 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@hmcts.gsi.gov.uk

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

25. 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.
26. 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

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