

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2022

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

Decision (including any steps ordered)

1. The complainant has requested information connected to meetings held with Sir Nick Clegg, then Facebook's¹ President of Global Affairs. The Office of Communications ("Ofcom") relied on section 44 (statutory prohibition) and section 36 (prejudice to the effective conduct of public affairs) of FOIA to withhold the requested information.
2. The Commissioner's decision is that Ofcom is only entitled to rely on section 44 of FOIA to withhold some of the information falling within the scope of the request. Of the information to which section 44 does not apply, all of the information engages section 36(2)(b)(i) and 36(2)(b)(ii) of FOIA, but the balance of the public interest favours disclosure of some (though not all) of this information. Ofcom has not demonstrated that section 36(2)(c) applies to any of the withheld information. The Commissioner also finds that Ofcom failed to identify correctly the information that did and did not fall within the scope of the request. Finally, the Commissioner finds that Ofcom breached section 17 of FOIA as it failed to issue its refusal notice within 20 working days.
3. The Commissioner requires Ofcom to take the following steps to ensure compliance with the legislation.

¹ The Commissioner recognises that Facebook has now re-branded itself as "Meta." However, given that this occurred after Ofcom responded to the request, the Commissioner has, for simplicity, used the company's old name throughout this notice.

- Disclose to the complainant the information identified in Confidential Annex A.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 March 2021 the complainant requested information of the following description:

"[1] All emails that were sent / received from 'Nicholas Clegg', 'Nick Clegg', 'Clegg', 'Sir Nicholas Clegg', 'Sir Nick Clegg', 'clegg@fb.com', 'nclegg@fb.com' or emails in your system that mention any of these terms.

"[2] Records of meetings, notes or minutes of those meetings and documents prepared for meetings with Nick / Nicholas Clegg

"[3] Phone logs of calls with Nick / Nicholas Clegg

"The time period for these three requests is October 1st 2018 to the date this request was received. For all three requests I would ask that you limit it to these people:

"Dame Melanie Dawes, chief exec, and her predecessor Lord Burns / Terence Burns

"Martin Ballantyne, Ofcom's General Counsel and Legal Group Director.

"Tony Close, former director of content standards, and the current holder of the post, Alison Marsden."

6. On 20 May 2021, Ofcom responded. It noted that it only held information relating to meetings Sir Nick had had with its current Chief Executive and refused to provide this information. It cited the following exemptions as its basis for doing so:
- Section 44 – statutory prohibitions on disclosure
 - Section 36 – prejudice to the effective conduct of public affairs
 - Section 40(2) – third party personal data

7. The complainant requested an internal review on Wednesday 2 June 2021. Ofcom sent the outcome of its internal review on 21 June 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 16 August 2021 to complain about the way his request for information had been handled.
9. Ofcom provided its submission on 21 June 2022, setting out its justification for applying the exemptions. It also provided five documents that it was withholding, as well as a further document, which appeared to be a summary of correspondence containing embedded information that the Commissioner was unable to access.
10. The Commissioner contacted Ofcom to clarify whether the embedded information was within scope and, if it was, whether it was being withheld and under what exemption. Ofcom responded to say that:

“the links in that document showed samples of documents we considered to be in scope to the request (but ultimately applied an exemption to), to give the qualified person an idea of what documents we held and what exemptions we considered may apply, in advance of the meeting to consider s.36. The ICO shouldn't need to see the individual documents themselves.”
11. The Commissioner responded to say that he very much did need to see the individual documents and now sought all the information being withheld (he had previously only sought the pre-meeting material).
12. Having considered all the information that Ofcom had identified as being in scope, the Commissioner took the view that not all of the information was in fact within the scope of the request. The reasons for this are explained below.
13. The complainant has indicated that he is happy for the names of junior staff to be redacted.
14. As section 44 is an absolute exemption, the Commissioner intends to consider that exemption first. To the extent that Ofcom has not, or he finds it cannot, rely on section 44, the Commissioner will then determine whether Ofcom is entitled to rely on section 36 of FOIA to withhold any of the remaining information.
15. The Commissioner considers that the scope of his investigation is to:

- A. Determine which of the information Ofcom has identified actually falls within the scope of the request
- B. Determine whether any of the information identified in part A engages section 44
- C. Determine whether any of the information identified in part A but not covered by Part B engages section 36.
- D. Comment on the procedural handling of the request.

Reasons for decision

A. Which information falls within the scope of the request?

- 16. Ofcom identified a total of 22 emails that it considered were within scope and would engage section 36 of FOIA only. It also identified a further 15 emails and a document that would engage both section 44 and section 36.
- 17. Of the information that Ofcom has relied on both section 44 and section 36 to withhold, the Commissioner is satisfied that this all falls within the scope of the request (although one email only partially falls within scope).
- 18. However, of the remaining information, the Commissioner considers that only some fall within scope.
- 19. The request was very clear that it sought records documenting Ofcom's meetings with Sir Nick or documents "**prepared for** [such] meetings." [emphasis added] There was a clear focus on the meetings themselves and not on Ofcom's engagement with Facebook or Sir Nick more generally.
- 20. A number of the emails Ofcom identified as falling within the scope of the request were various press briefings, some of which (though not all) covered matters relating to Facebook. These emails did not appear to have been gathered together in advance of any specific meeting and Ofcom did not indicate why it considered that these emails had been "prepared for" any specific meeting.
- 21. It is clear from the content and correspondence of some of these emails that they were originally simply routine emails circulated within Ofcom to highlight news of broad interest to colleagues. There is nothing to suggest that any of this material was prepared or even collated in anticipation of any meeting with Sir Nick. Some of the information

(briefings for completely different meetings) appeared to have no relevance to the request whatsoever.

22. Of the 22 emails Ofcom identified, the Commissioner considers that only five fall fully within the scope of the request, with a further five emails being partially being caught. One of the remaining emails is a duplicate of an email within scope, however none of the other emails fall within the scope of the request.
23. The Commissioner has set out, in Confidential Annex B, the information that he considers to fall (or not fall) within the scope of the request.

B. To what extent is section 44 engaged?

24. Section 44(1) of the FOIA provides an exemption from disclosure for any information whose disclosure to the world at large, outside of FOIA, would either be prohibited by another piece of legislation or would constitute a contempt of court.
25. In this case, Ofcom has cited the Communications Act 2003 as the legislation preventing it from disclosing the information. In order to demonstrate that section 44 is engaged, the Commissioner must carry out a three step test:
 - a) Does the Communications Act 2003 prevent disclosure of any particular category(s) of information? If so;
 - b) On the facts of the case, does the information being withheld fall within one or more of those categories and, if and to the extent that it does;
 - c) Is he satisfied that none of the lawful gateways for disclosure, set out in the Communications Act, would permit disclosure under FOIA.
26. If the answer to all the above questions is "yes," section 44 will be engaged. If and to the extent that any of the answers is "no", the information in question will not be covered by section 44.
27. Section 393(1) of the Communications Act 2003 states that:

Information with respect to a particular business which has been obtained in exercise of a power conferred by—

 - (a) this 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.

28. Section 393(10) of the Act states that:

A person who discloses information in contravention of this section is guilty of an offence and shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

29. The Commissioner is satisfied that section 393 of the Communications Act 2003 makes it a criminal offence to disclose certain information outside of prescribed circumstances. It is therefore capable of acting as a statutory prohibition on disclosure.

Is the withheld information subject to section 393?

- 30. In order to be covered by this statutory prohibition, the withheld information must be or must reflect information that Ofcom has obtained in the exercise of its functions. This would include information it had obtained directly from the organisation, but would also include information it had obtained about the organisation from third parties (such as whistleblowers).
- 31. The Commissioner also accepts that material that has been created internally by Ofcom can still be subject to this statutory prohibition if that material reveals the content of information that Ofcom has obtained from another party.
- 32. Ofcom has relied on section 44 of FOIA (by way of section 393 of the Communications Act 2003) to withhold pre-meeting briefing material, an internal email discussion and post-meeting notes of the matters that had been discussed. It argued that it had obtained this information in the course of exercising its function of "promoting media literacy" set out in section 11 of the Communications Act.
- 33. The Commissioner accepts that the meeting summaries are covered by the statutory prohibition as these contain information "obtained" from Facebook during the course of those meetings. However some of the emails referred to the meetings in general rather than specifying any specific matter that was or was not discussed.
- 34. In relation to the pre-meeting briefing document, the Commissioner does not consider that the whole document engages the statutory bar.
- 35. The document does contain some sections which detail previous engagement with Facebook and a current project. These sections either

contain or reflect previous discussions with Facebook and are thus subject to the statutory prohibition.

36. However the remainder of the document contains a broad overview of the regulatory landscape. To the extent that it mentions Facebook at all, those references are based on published information – indeed the document contains numerous footnotes citing sources for various statements, all of which are in the public domain.
37. The pre-meeting email chains simply reflect matters that Ofcom might raise, or refer to the fact that a meeting took place.
38. The Commissioner recognises that in order to perform their functions effectively, regulators such as Ofcom (and indeed himself) require access to information that regulated entities would not normally wish to hand over. Statutory prohibitions such as section 393 give those regulated entities the confidence that they can share information with the regulator, safe in the assurance that that information will be kept confidential.
39. In the Commissioner's view, information that is already in the public domain cannot possibly have been said to have been obtained by Ofcom in the exercise of its functions. It does not need to exercise any function to acquire this information because it is already available to anyone who wishes to access it. Nor could any regulated entity credibly claim that it had provided such information in confidence.
40. Whilst Ofcom argued that some of the information was still covered by the exemption because it might reveal "directly or indirectly", the topics that were discussed, the Commissioner considers that this is far too tenuous a connection. Furthermore the information is far too generic to reveal what was actually even discussed, let alone what information Facebook provided. The Commissioner considers that those familiar with this particular policy area would already be aware of the sorts of topics that are set out in the emails.
41. The Commissioner is highly sceptical that any person could be successfully prosecuted under section 393 of the Communications Act 2003 unless it could be demonstrated that the specific information they had disclosed could be traced back to a specific piece of information that Ofcom had obtained from (or about) another organisation. Vague references to Facebook or topics that might be brought up in a future meeting with Facebook or which might reflect something that Facebook has previously mentioned will not be prohibited from disclosure. Nor would it be credible to suppose that any Ofcom employee would be likely to receive a two-year prison sentence for sharing information that was already in the public domain.

42. In respect of those parts of the withheld information that do engage section 393, the Commissioner has considered the various lawful gateways to disclosure that are contained within section 393(2) of the Communications Act 2003. Disclosure of this information is not required to fulfil the functions of Ofcom or any person listed in section 393(3) of that Act. The remaining gateways relate to court orders or Ofcom's obligations under other pieces of legislation² – none of which apply to FOIA. Therefore, where the withheld information is covered by section 393, there is no lawful gateway which would allow its disclosure and thus any disclosure of this information would breach the Communications Act 2003.
43. As some of this information is subject to a statutory prohibition, it follows that section 44 of FOIA is engaged in respect of this information.
44. As section 44 is an absolute exemption there is no need for Ofcom to demonstrate that disclosure of this information would be harmful and no requirement for the Commissioner to consider the balance of the public interest.
45. Confidential Annex B sets the information which does and does not engage the exemption.

C. To what extent does the withheld information engage section 36?

46. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
47. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - “(a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (b) would, or would be likely to, inhibit—

² It is irrelevant that FOIA is not one of the pieces of legislation listed, as section 44 of FOIA requires that Ofcom consider what the position would be if the disclosure took place outside of FOIA.

- (i) the free and frank provision of advice, or
 - (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.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words 'in the reasonable opinion of a qualified person'."
48. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

49. In its initial response to the complainant, Ofcom provided a copy of a document that had been signed electronically by Jacqui Gregory on 20 May 2021. That document, listed as Annex A ("the first Annex"), referred to another document, listed as Annex B ("the second Annex"), which Ms Gregory referred to as being her opinion on the application of section 36 of FOIA.
50. Ms Gregory was the Corporation Secretary of Ofcom up until April 2022 and, in that role, she had been authorised to act as the Qualified Person for the purposes of section 36 of FOIA.
51. Ofcom explained that a meeting had been held on 17 May 2021 in which Ms Gregory had been shown copies of all the information within the scope of the request. Following that meeting, Ms Gregory was supposed to have sent an email signalling her agreement with the arguments set out in the second Annex. No copy of that email was provided to the Commissioner.

52. The Commissioner accepts that Ms Gregory was entitled to act as the Qualified Person and that, in signing the first Annex, she adopted the second Annex as her opinion. He therefore considers that the Qualified Person has offered their opinion but, in the absence of evidence from the 17 May meeting, he considers that the opinion was not provided until 20 May 2021 – although nothing turns on these dates.

What was the opinion and was it reasonable?

53. As has been noted above, it is not the Commissioner's role to substitute his own opinion for that of the Qualified Person – who is best-placed to judge the possible prejudice that may arise from disclosure. It follows that the bar for demonstrating that an opinion is reasonable is not high.

54. The opinion need not be the most reasonable opinion available or the one with which the Commissioner most agrees. It must simply fall within the spectrum of opinions that a reasonable person might hold.

55. An opinion will not be reasonable if it is irrational or absurd or if it fails to make out the particular limb of the exemption being cited.

56. It is far from clear, from either the first or the second Annex, which limbs of the exemption the Qualified Person considered to be engaged. However, Ofcom noted in its submission that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were all engaged. The Commissioner accepts that these limbs were paraphrased in Annex B – though not in a context that made clear that these limbs were all being relied upon.

57. In addition, the Commissioner notes that section 36 only requires the Qualified Person to offer their views on the prejudice that they consider would (or would be likely to) result from disclosure. The way that the second Annex was set out indicated that the Qualified Person had conflated the prejudice and public interest tests – these are separate tests, as confirmed by the Upper Tribunal in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC).

58. However, the Commissioner has been able to determine two themes which might be considered to constitute prejudice that might result from disclosure:

- Inhibiting the Chief Executive from discussing upcoming meeting, which might potentially be sensitive, with her senior staff.
- Inhibiting senior staff from discussing and debating Ofcom's future role in debating online harms.

59. The Commissioner does not consider that either of these opinions is irrational or absurd and, although they could have been better related to the limbs, they do make out a case for engaging sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA. He therefore accepts that these limbs of the exemption are engaged at the lower bar that disclosure "would be likely to" cause prejudice.
60. In respect of section 36(2)(c), the caselaw on this particular limb of the exemption states that, in order to "**otherwise** prejudice the effective conduct of public affairs", the Qualified Person must identify some form of prejudice that would not be covered by any other exemption.
61. In *Evans v Information Commissioner and the Ministry of Defence* (EA/2006/0064), the Tribunal, having considered the arguments put forward by the MoD in support of section 36(2)(c), noted that:
- "The principle arguments in favour of this exemption advanced by the MoD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not 'otherwise'. Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged."
62. A year later, in *McIntyre v Information Commissioner and MoD* (EA/2007/0068), the Tribunal expanded on this point:
- "this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure."
63. The Commissioner has found nothing in the Qualified Person's opinion that identifies a prejudice that is not covered by the other two limbs of the exemption. He therefore takes the view that the Qualified Person has not identified how disclosure would (or would be likely to) "otherwise" prejudice the effective conduct of public affairs.
64. The Commissioner thus finds that Ofcom was not entitled to rely on section 36(2)(c) of FOIA to withhold any information.

Public interest test

65. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
66. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
67. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring does not have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
68. The information which Ofsted is relying on section 36 of FOIA to withhold comprises various email chains prepared for the meetings with Sir Nick. Some chains only include a small reference to Sir Nick in the context of a much broader discussion, others have an impending meeting as their main focus.
69. Ofcom did not attempt to differentiate between any of this material. It argued that the public interest favoured maintain all of it because:

“We considered that there was limited public interest in disclosure of internal correspondence of an administrative nature in connection with stakeholder meetings, particularly in circumstances where it is public knowledge that Ofcom’s Chief Executive has met with a particular stakeholder such as Facebook. Any public interest in this information was outweighed by the need for Ofcom’s Chief Executive to be supported in her role in managing and maintaining stakeholder relationships to further the interest of consumers and citizens and carry out Ofcom’s functions in relation to online harms.

“Disclosure would have been likely to inhibit the ability of the Chief Executive to conduct stakeholder meetings and run Ofcom effectively.
- We also considered that the public interest in disclosure was outweighed by the need for Ofcom to share information internally that assists in the effective conduct of Ofcom’s regulatory functions, including Ofcom’s work preparing for our online harms role.”
70. Set against that, Ofcom recognised that there was a public interest in transparency, as well as raising awareness of, and trust in, Ofcom’s regulatory processes.

The Commissioner's view

71. In the Commissioner's view, the public interest favours disclosure of some of this information, but not all.
72. As a general rule, the Commissioner is traditionally sceptical of arguments about so-called "chilling effects." Senior and well-remunerated public officials should be persons of robust character, not easily dissuaded from providing candid assessments or challenging prevailing orthodoxies.
73. That being said, the Commissioner does accept that one chain of emails ought to be withheld. This comprises a conversation between senior members of staff who were invited to think of questions to put to Sir Nick.
74. Nothing within this chain identifies the actual questions that were put to Sir Nick, the emails simply record a process of senior staff debating the most appropriate questions to be put to him.
75. The Commissioner recognises that it is important that officials are able to put forward suggestions that might be controversial or challenging and to debate the pros and cons of such suggestions. Given that meetings of this nature are rarely long enough to cover all relevant matters it is inevitable that there must be some sort of process of prioritisation. Revealing suggested questions could lead to officials in future preparing questions on based on public presentation rather than on those matters which are most important. That could lead to officials suggesting more questions which are less relevant but would be considered popular with the public or could lead to officials failing to suggest relevant questions on the basis that they might be controversial.
76. These emails document a process of deliberation that the Commissioner accepts would likely be inhibited if these emails were disclosed. He therefore accepts that the public interest would favour maintaining sections 36(2)(b)(i) and 36(2)(b)(i) of FOIA.
77. Some of the briefing note should also be withheld. The Commissioner recognises that parts of this briefing represent an "internal line to take" for Ofcom, or reflect more sensitive negotiations that the Ofcom had or was having with the Government at the time. The Commissioner recognises that, in some circumstances, there will a strong public interest in allowing senior officials to provide advice on sensitive topics, where relevant, without fear that the information will eventually be published.

78. Whilst the information does not reveal its author, the Commissioner does accept that maintaining the exemption would be important to protect Ofcom's ability to negotiate with the Government and to advise its Chief Executive accordingly. He therefore accepts that the balance of the public interest favours withholding sections of the pre-meeting brief.
79. There is a further document that Ofcom provided to the Commissioner that he considers to be in scope but agrees is exempt. This is a draft report with a single reference to Sir Nick. This reference does not engage section 44 as it does not disclose anything of substance about what Sir Nick said, but the Commissioner accepts that the document is a draft version and it is clear that it was likely to be altered.
80. The Commissioner accepts that such a document does reflect one stage of a process of discussion, deliberation and advice. Disclosing the particular part of the document that falls within scope would add very little to wider public understanding of Ofcom's broader approach to Facebook and therefore the Commissioner accepts that the balance of the public interest favours maintaining the exemption.
81. Finally, the Commissioner notes that there are two further email chains, one of which is a complete duplicate of the other, in which draft emails to stakeholders are proposed. The Commissioner considers that nothing would be gained by disclosing these drafts as the substance can already be found in the other material he is ordering Ofcom to disclose. He therefore finds that the public interest favours withholding this information.
82. However, that still leaves a number of email chains and the remainder of the pre-meeting brief. The Commissioner does not consider that there is a strong public interest case for withholding this information as it is largely factual information – most of which is already in the public domain. There are also a series of emails providing the Chief Executive with a general overview of the regulatory landscape and upcoming meetings for the week ahead. Whilst the Commissioner accepts that it is possible that such emails may be designed differently if they were intended for publication, he considers that this is unlikely and would not, in any case, cause considerable prejudice. Therefore the public interest in withholding such information is weak.

83. By contrast, the Commissioner has previously drawn attention to the strong public interest in understanding the nature of Facebook's engagement with the organs of the state, given its size and influence.³
84. He therefore takes the view that the balance of the public interest favours disclosure of this information.
85. Confidential Annex B summarises the information that Ofcom is required to disclose and the information it may withhold.

Procedural Matters

86. Section 17(1) of FOIA requires a public authority that wishes to withhold information to inform the requestor, within 20 working days, of the exemption(s) that it wishes to rely upon to withhold the information.
87. Sections 10(3) and 17(3) of FOIA allow a public authority to delay issuing a refusal notice or disclosing non-exempt information where it considers that a qualified exemption applies and where it needs further time in order to consider the balance of the public interest. FOIA does not impose a maximum time limit on such a delay – only that the delay must be "reasonable in the circumstances."
88. The Commissioner's guidance makes clear that this provision is only intended to cover the time the public authority needs to spend completing its public interest considerations:

"the additional time cannot be used to determine whether the exemptions themselves are engaged...this means that the authority should have identified the relevant exemptions, and satisfied itself that they are applicable, within the initial 20 working day time limit."
89. Whilst section 36 is subject to a public interest test, the way that the exemption is structured makes clear that the engagement of the exemption will turn on the opinion of the Qualified Person.
90. In this case the Commissioner has found that the Qualified Person did not provide her opinion until 20 May 2021 – the same day that Ofcom issued its refusal notice. The extension of time beyond 20 working days could not therefore have been necessary to consider the balance of the

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See, for example <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020648/ic-117190-v1f3.pdf> (paras 35-39)

public interest – as Ofcom would not have known that the exemption was engaged, prior to the Qualified Person issuing her opinion.

91. Even if the Commissioner had been prepared to accept that the Qualified Person's opinion was issued on 17 May, that would still have been more than 20 working days after Ofcom received the request.
92. The Commissioner is therefore not satisfied that Ofcom was entitled to extend the deadline for issuing its refusal notice in order to consider the balance of the public interest. It follows that Ofcom breached section 17 of FOIA in responding to the request.

Confidential Annexes

93. In order to preserve a meaningful right of appeal for Ofcom (should it wish to exercise it) the Commissioner has been compelled to place certain matters within two confidential annexes (Confidential Annex A and Confidential Annex B). These will be provided to Ofcom only.
94. The Commissioner accepts that this may be frustrating to the complainant and would, as a matter of fairness, prefer to make his reasoning public wherever possible.
95. However, in the circumstances of this case, the Commissioner considers that some parts of his analysis are only comprehensible and some of the information only identifiable, by reference to the contents of some of the information that is being withheld. It is important that Ofcom understands why the Commissioner has decided that individual pieces of information should or should not be disclosed, but providing such analysis would undermine the purpose of applying the exemption in the first place. There is also the possibility that Ofcom may disagree with some or all of the Commissioner's decision and wish to appeal – such an appeal will be moot if the information that it wishes to maintain is exempt has already been disclosed via the decision notice.
96. In the interests of fairness, the Commissioner provides the following summary.
97. Confidential Annex B provides an item-by-item summary of the various pieces of information Ofcom has identified. For each item, it shows whether that item is wholly, partially or not at all:
 - i) Within the scope of the request
 - ii) Exempt under section 44

- iii) Exempt under section 36
- iv) Disclosable

98. Confidential Annex A sets out the information that Ofcom must disclose (with reference to Confidential Annex B). Where information is partially within scope or partially covered by an exemption, there is some analysis setting out which parts are and are not covered. Finally, there is some further specific analysis as to why certain sections of information are (or are not) exempt – with reference to the contents of the information themselves.

Other matters

99. The Commissioner would draw attention to his template for recording the opinion of the qualified person and would encourage all public authorities to use it.⁴ The template sets out, in detail, all the various matters that the qualified person must consider and decide upon. Using the template will allow the qualified person to provide their opinion clearly and concisely.

⁴ https://ico.org.uk/media/for-organisations/documents/1176/section_36_record_of_the_qualified_persons_opinion.doc

Right of appeal

100. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

101. 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.

102. 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

Roger Cawthorne
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