



# Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2009/0067  
Information Commissioner's Ref: FS50184499

Heard at Central London County Court  
On 9<sup>th</sup> December 2009

Decision Promulgated  
11 January 2010

**BEFORE**

**JOHN ANGEL**

**Chairman**

**and**

**MARION SAUNDERS AND MICHAEL HAKE**

**Lay Members**

**Between**

**GERRY MORRISSEY**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**OFFICE OF COMMUNICATIONS**

**Additional Party**

**Subject matter:**

FOIA s.44 – Absolute exemption: prohibitions on disclosure  
Communications Act 2003 ss. 27, 373 and 393(1)&(2)

**Cases:**

*Hoyte v IC & Civil Aviation Authority* EA/2007/0101  
*Boddington v. British Transport Police* [1999] 2 AC 143

## **Representation:**

For the Appellant: Victoria Jolliffe  
For the Respondent: Ben Hooper  
For the Additional Party: Kate Gallafent

## **Decision**

The Tribunal allows the appeal to the extent that two broadcasters had in fact consented to disclosure within the terms of section 393(1) of the Communications Act 2003, with the effect that section 393(1) could not apply to such of the requested information as was provided by those broadcasters, the Information Commissioner's Decision Notice dated 22 July 2009 is substituted to the extent that the Office of Communications (Ofcom) is ordered to release to Gerry Morrissey within 28 days of this decision the information provided by:

1. Radio North Angus Ltd., and
2. The Chinese Channel Ltd

in relation to question 4 of Ofcom's "Questions for 2005 Returns" in respect of equal opportunities reporting.

Otherwise the Tribunal upholds the Information Commissioner's decision that the rest of the disputed information should be withheld.

## **Reasons for Decision**

### **The Request**

1. The background to the Request is set out in the Information Commissioner's Decision Notice dated 22 July 2009 (the Decision Notice).
2. On 5 July 2007 Gerry Morrissey (Mr Morrissey), who is the General Secretary of the Broadcasting Entertainment Cinematograph and Theatre Union (BECTU), wrote to the Office of Communications (Ofcom) and, with reference to an Ofcom publication - 'Broadcasters' Returns on Equal Opportunities 2005, Summary Report and Statistics' - requested the following:

"...the full report containing the statistical data for each of the 138 licencees from whom you have returns."

3. Ofcom responded on 19 July 2007 and stated:

“The information is being withheld as it falls under the exemption in section 44 of the Act [Freedom of Information Act 2000]. Under this section information which we hold on this subject is exempt from disclosure since it was obtained in exercise of a statutory power and disclosure is prohibited under section 393 of the Communications Act 2003. Section 44 is an absolute exemption under the Act and does not require a public interest test.”

4. On 19 September 2007 Mr Morrissey wrote to Ofcom and asked it to reconsider the decision to refuse to provide the requested information. Mr Morrissey asked Ofcom to consider the following in reviewing the decision:
  - i. that s.393(2) of the Communications Act 2003 (2003 Act) permits disclosure “made for the purpose of facilitating the carrying out by Ofcom of any of their functions”. The complainant argued that the specified information fell into this category, and
  - ii. that Ofcom’s decision to withhold the information “...defies the precedent set by Ofcom’s predecessor regulatory body, the Independent Television Commissioner, which published precisely the data we requested for all its licencees – including each ITV franchise individually – on an annual basis.”
  
5. On 26 October 2007 Ofcom wrote to Mr Morrissey following its internal review and confirmed that it upheld the original decision to withhold the requested information stating:
  - i. “Disclosure of the information you have requested is not, in our view, necessary to facilitate the carrying out of our functions and we are not persuaded that there is any case that it would be.”
  - ii. “...Ofcom is operating in a different landscape to that previously regulated by the ITC [The Independent Television Commission].... the ITC was also not under the same obligations as Ofcom now is by the operations of the Freedom of Information Act and as we have indicated, we are prohibited by Statute from releasing the information you have requested.”
  - iii. “The collection of statistics is a separate matter to that of our duty under section 337 and has a different level of significance amongst this cohort of licencees when compared to those reported on by the ITC.”
  
6. Ofcom also provided Mr Morrissey with a copy of a letter (dated 2 October 2007) sent to all broadcasters subject to its regulation. This letter explained that Ofcom was prohibited by the Freedom of Information Act 2000 (FOIA) from releasing the detailed statistics specified in the request but urged broadcasters to provide this information if approached.

### The complaint to the Information Commissioner (IC)

7. Mr Morrissey complained to the IC on 19 November 2007. The IC investigated the complaint and on 22 July 2009 issued the Decision Notice upholding Ofcom's decision to withhold the information requested.
8. In the Decision Notice the IC made the following principal findings:
  - a. The requested information was in respect of a particular business within the meaning of s.393(1) of the 2003 Act (§21);
  - b. The requested information had been obtained in exercise of a power conferred by the 2003 Act (§29); and
  - c. Ofcom was under no duty to seek consent for disclosure from the persons for the time being carrying out that business (§33); and accordingly
  - d. The requested information fell within the statutory prohibition provided by s.393(1) of the 2003 Act; and as a result
  - e. The s.44 FOIA exemption was engaged and as this is an absolute exemption Ofcom was not obliged to disclose the requested information.
9. The IC thereafter proceeded to consider whether the requested information fell within the scope of s.393(2), such that the statutory prohibition under s.393(1) was dis-applied. He concluded that s.393(2)(a) did not provide Ofcom with a discretion to disclose the requested information, but rather simply set out the circumstances in which the statutory bar on disclosure did not apply (Decision Notice §43). In this context the IC found that an interpretation of the Civil Aviation Act and related legislation, which had been the subject of consideration by the Information Tribunal in *Hoyte v IC & Civil Aviation Authority* [EA/2007/0101], was not analogous (Decision Notice §43).
10. Notwithstanding his conclusion that Ofcom did not have the discretion to disclose the request information, the IC nevertheless proceeded to consider, in the alternative, whether Ofcom had exercised such discretion reasonably assuming it existed (Decision Notice §46). Having noted that a wide degree of latitude needed to be given to the decision taken by the public authority, and that it was not the role of the IC to determine how, exactly, Ofcom should fulfil its responsibilities, he concluded that Ofcom's decision not to disclose the requested information could not be impugned as being blatantly irrational and was within the range of reasonable responses open to it as a regulator (Decision Notice §48).

### The appeal to the Tribunal

11. Mr Morrissey served a Notice of Appeal on the Information Tribunal dated 17 August 2009. The Tribunal issued directions on 5 October 2009 which were revised on 7 October 2009. Ofcom was joined as a party. The case was heard at an oral hearing on 9 December 2009. There was one witness, Tim Suter, who was a member of Ofcom's

Content Board and held executive responsibility for Ofcom's Content and Standards division at the time the Request was dealt with, and whose evidence is referred to below.

12. Ms Jolliffe on behalf of Mr Morrissey asks the Tribunal to consider the following issues:
- a. Did the IC have sufficient evidence before it to conclude that Ofcom made a decision that disclosure of the information would not facilitate the carrying out of its duty to take all appropriate steps for promoting equality of opportunity?
  - b. Did Ofcom in fact make a decision that disclosure of the information would not facilitate the carrying out of its duty to take all appropriate steps for promoting equality of opportunity?
  - c. If yes, when was that decision taken?
  - d. If yes, is Ofcom correct to state that such a decision is only open to judicial review or supervision by the Equality & Human Rights Commission (EHRC)?
  - e. If the IC had, and the Tribunal has, the jurisdiction to review this decision, did the IC err in finding that that Ofcom's decision to withhold the requested information was in the range of reasonable responses?
13. In order for the Tribunal to consider whether these are the correct issues for us to determine in this appeal, and if so how, it is necessary to set out the statutory framework.

### Statutory Framework

#### *Communications Act 2003*

14. Ofcom was established by the Office of Communications Act 2002. Under section 1(1) of the Communications Act 2003 (the 2003 Act), its functions include:

“(a) the functions transferred to OFCOM under section 2; and  
(b) such other functions as may be conferred on OFCOM by or under any enactment (including this Act).”

15. Under s.2 of the 2003 Act such functions of the Secretary of State and of previous regulators (including the Independent Television Commission) as are set out in Schedule 1 to the Act were transferred to Ofcom with effect from 29 December 2003. These functions included:

“(a) the function of granting or awarding licences under Part 1 of the [Broadcasting Act] 1990 (independent television services) and Part 1 of the [Broadcasting Act] 1996 (digital television broadcasting);  
(b) the [Independent Television] Commission's functions under those Parts in relation to, and to applications for, licences under either of those parts.”

16. As for duties conferred under the 2003 Act itself, s.27 (entitled “training and equality of opportunity”) provides so far as it is relevant to this case that:

- “(2) It shall be the duty of OFCOM to take all such steps as they consider appropriate for promoting equality of opportunity in relation to both –
- (a) employment by those providing television and radio services; and
  - (b) the training and retraining of persons for such employment.
- (3) It shall be the duty of OFCOM, in relation to such employment, training and retraining, to take all such steps as they consider appropriate for promoting the equalisation of opportunities for disabled persons.
- (4) The reference in subsection (2) to equality of opportunity is a reference to equality of opportunity –
- (a) between men and women; and
  - (b) between persons of different racial groups.”

17. S.337 (entitled “promotion of equal opportunities and training”) provides that:

- “(1) The regulatory regime for every service to which this section applies includes the conditions that OFCOM consider appropriate for requiring the licence holder to make arrangements for promoting, in relation to employment with the licence holder, equality of opportunity—
- (a) between men and women; and
  - (b) between persons of different racial groups.
- (2) That regime includes conditions requiring the licence holder to make arrangements for promoting, in relation to employment with the licence holder, the equalisation of opportunities for disabled persons.
- (3) The regulatory regime for every service to which this section applies includes the conditions that OFCOM consider appropriate for requiring the licence holder to make arrangements for the training and retraining of persons whom he employs, in or in connection with—
- (a) the provision of the licensed service; or
  - (b) the making of programmes to be included in that service.”

18. S.393 of the 2003 Act imposes general restrictions on the disclosure of information in the following terms:

- “(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  
[...]
- 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.

- (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; [...]

### *Freedom of Information Act 2000*

19. S.44 FOIA provides as follows:

- “(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –
  - (a) is prohibited by or under any enactment, [...]”

20. For the purposes of s.2 FOIA, s.44 is to be regarded as conferring absolute exemption (s.2(3)(h)).

### How the absolute exemption is engaged

21. In order for s.44 FOIA to be engaged there needs to be prohibition from disclosure of the information in another statutory provision. In this case s.393(1) of the 2003 Act provides the prohibition provided the information is:

- i. obtained by Ofcom in respect of an existing particular business in exercise of its powers under the 2003 Act, and
- ii. there is no consent to disclosure.

22. Ms Jolliffe on behalf of Mr Morrissey does not contest the IC’s findings that the disputed information both (1) concerns particular businesses and (2) was obtained in exercise of a power conferred by the 2003 Act. Also all parties agree that, unless any of the broadcasters at issue have in fact consented to disclosure, the disputed information is capable of falling within the scope of the prohibition in s. 393(1) of the 2003 Act.

23. In the Decision Notice, the IC found at §30 that consent had not been given at the time that the Request was received. All parties accept that Ofcom was not required on receiving the Request to seek the consent of the broadcasters to disclosure of the statistical information. However, when drafting the Decision Notice, the IC had not been provided with any of the email replies to Ofcom’s letter of 2 October 2007, which were only disclosed in the final hearing bundle. This letter explained Ofcom’s position in relation to the Request to broadcasters and also stated that

“...Ofcom believes that there would be real value in licensees voluntarily publishing a breakdown of their individual employment statistics....”

24. As a result many broadcasters emailed Ofcom indicating their position in relation to this suggestion. At the hearing Ofcom agreed to disclose the employment statistics of two broadcasters who had consented to the disclosure of their statistical information.

25. Although s.393(1) may appear to be engaged there is another hurdle. Under s.393(2) subsection (1) does not apply to any disclosure of information which is made “for the purpose of facilitating the carrying out by OFCOM of any of their functions.”
26. In the present case the relevant function under consideration is the obligation set out under s.27 of the 2003 Act, namely the duty under s.27(2)(a) for Ofcom “to take all such steps as they consider appropriate for promoting equality of opportunity in relation to ..... employment by those providing television and radio services”.
27. The way Ofcom facilitates the carrying out of this duty is to use its powers under s.337 to impose conditions in a broadcaster’s licence in relation to promotion of equal opportunities. That is how it is able to obtain the statistical data.
28. Having considered how s.393(1) is engaged the Tribunal now needs to determine whether in the circumstances of this appeal the prohibition is dis-applied.

#### Whether the prohibition is dis-applied

29. The principal issue for the Tribunal to decide in this case is whether the prohibition under s.393(1) is dis-applied by s.393(2)(a). In order to do this we must first consider the evidence.

#### ***The evidence***

30. Ofcom inherited responsibility for regulation of broadcasting from the ITC who only had responsibility for regulating holders of public service channel licences e.g. Channel 3, 4 and 5. Although the statutory framework was similar, the position under the Ofcom framework was different in a number of ways, in particular regulation was extended to all broadcasters which meant an increase from 19 to over 500 organisations. However the obligations under s.337 only apply to the larger organisations (where the licensee employs, or is likely to employ, more than the threshold number of individuals, which is at least 20<sup>1</sup>) which we understand is 96 broadcasters in relation to this appeal.
31. The ITC had published the detailed employment statistics of each broadcaster. However Ofcom took a different approach. Mr Suter gave evidence that from its inception Ofcom decided to collect reports from broadcasters regarding their arrangements for promoting equal opportunities in order to capture a picture of the current position to be able to gauge the sort of steps it might be appropriate to take from that point. Ofcom asked the broadcasters to submit their equal opportunity report via an online reporting database for the calendar year 2005. The same information had been requested for 2004 but in hard copy. The request included a request for a breakdown of employment statistics for each broadcaster by sex, race and disability.

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<sup>1</sup> S.337(6),(7),(8) & (9) of the 2003 Act.



32. The request was accompanied by ‘frequently asked questions’ sheet. One of the questions “Will our information be kept confidential?” was answered by saying “Yes, however, the information provided by broadcasters in relation to their reporting on equal opportunities will be used in Ofcom’s general assessment of the promotion of equal opportunities. Also Ofcom is subject to the requirements of the Freedom of Information Act”.
33. According to Mr Suter the collection of company employment statistics was part of the process of examining and understanding broadcasters’ arrangements rather than (at least initially) to scrutinise the employment statistics against a particular measure. The information collected in 2004 was poor and the response rate low and as a result Ofcom decided not to publish anything. Instead Ofcom published a toolkit in July 2005 to assist broadcasters with putting in place effective arrangements for promoting equality of opportunity in employment.
34. At the end of 2005 Ofcom requested the same statistics but for that year. This time Ofcom had a good response, some 96 proper reports. Mr Suter produced a Decision Paper dated 14 November 2006 (the Decision Paper) for the Board meeting of the same date which recommended that as the broadcasters were still on a learning curve that Ofcom should:
- i. begin the process for considering co-regulation with the Broadcast Training and Skills Regulator (BTSR); and
  - ii. issue formal guidance recommending minimum standards for broadcasters regarding their arrangements for promoting equal opportunities.
35. A summary report and statistics entitled ‘Broadcasters’ Returns on Equal Opportunities 2005’ dated November 2006 (the 2005 Report) accompanied the Decision Paper<sup>2</sup> and was before the Board on 14 November. The report contained a summary of the statistics from the broadcaster reports but did not identify any broadcaster.
36. In evidence Mr Suter said that the Board approved the two recommendations and the publication of the summary report at the Board meeting. However the extract from the Board Minutes only refers to agreement to implement the two recommendations and there is no reference to approval of the publication of the 2005 Report. However not only the Decision Paper but also the draft minutes of the 44<sup>th</sup> meeting of the Ofcom Content Board held on 7 November 2006 mentions the publication of the 2005 Report as well as the two recommendations.
37. Ms Jolliffe on behalf of Mr Morrissey makes much of the fact there was no minuted approval of the publication of the 2005 Report. She suggests that there was no actual decision taken as to whether to publish a summary report or the full responses received by Ofcom. She points to the fact that until this appeal it was not clear on what basis it was decided only to publish the summary data.
38. We accept the evidence of Mr Suter before us that the Board made three decisions on 14 November which included the publication of the 2005 Report and not the more

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<sup>2</sup> See Part 1 paragraph 1.7 of the Decision Paper. Also referred to at paragraphs 4.6, 4.12 and in Part 2 paragraph 4.

detailed statistics requested by Mr Morrissey. Although there is clearly a governance issue in relation to the 2005 Report that is not a matter which concerns us.

39. What Mr Suter then says about these decisions is that they were the steps that Ofcom considered appropriate for promoting equality of opportunity, bearing in mind the broadcasters own arrangements at this point in time. Ofcom has taken all these steps and therefore complied with Ofcom's s.27 duties in relation to employment. S.393(1) cannot prohibit Ofcom from publishing the information relating to these steps, but does prohibit Ofcom from disclosing any other information which the Board had not considered appropriate for promoting equal opportunities, like disclosing the information requested by Mr Morrissey.
40. Mr Suter in cross-examination accepted that the option to publish the raw data was not put to the Board, only the summary in the 2005 Report.
41. Mr Suter wrote to all broadcasters on 2 October 2007, after dealing with the Request, to advise them of the Request and that although in his view Ofcom was prevented from disclosing the information by FOIA that "Ofcom believes that there would be real value in licensees voluntarily publishing a breakdown of their individual employment statistics". In a letter to Mr Morrissey of the same date Mr Suter writes "while Ofcom cannot release it, it would be of great benefit if they [the broadcasters] were to do so themselves".
42. Mr Suter later admitted that it was not FOIA that prevented the disclosure of the raw data but the fact that Ofcom did not consider it was appropriate at that point in time to discharge its duties under s.27 of the 2003 Act in that way.
43. Ms Jolliffe contends that when the Request was received that Ofcom should have considered compliance with the Request as another appropriate step to promote equal opportunities. This was particularly the case when it was established practice that one of the best ways to monitor equal opportunities was the publication of the information requested by Mr Morrissey. In fact she went further and suggested that every time such a request was made that should be considered as a possible appropriate step. She argues that the s.27 duty requires Ofcom to take all steps and such steps should be considered on a continuous basis.
44. Mr Suter accepted that once appropriate steps had been agreed in November 2005 that was not the end of the matter and that the steps should be kept under review but he did not accept that Ofcom was obliged to consider every suggestion or request when made in order to comply with its s.27 obligation.
45. In evidence Mr Suter explained that the reasons why only a summary of the employment statistics had been published were because:
  - i. As set out in paragraph 31 above the main purpose of gathering the information was to determine what arrangement broadcasters had in place and to get an overall picture of the position in the sector, rather than to conduct a statistical employment census, and
  - ii. Ofcom did not want to discourage broadcasters from providing such information in the future and wanted to continue efforts towards

generating a climate of compliance rather than using formal enforcement tools (action for breach of licence condition<sup>3</sup>) which were blunt, draconian (essentially licence revocation or fine), and resource intensive given the number of potential cases.

46. In the Request Mr Morrissey refers to 138 licensees from whom returns were obtained. In evidence Mr Suter explained that although there are nearly 500 licensed broadcasters most are below the threshold number of employees for making such returns. The 2005 Report refers to 96 reports analysed and not more. So the request was in fact considered in relation to these 96 reports.
47. Ofcom's predecessor the ITC had published the data requested by Mr Morrissey on an annual basis up to 2002, even after FOIA had come into existence. Mr Suter says that may have been the case but in 2006/2007 Ofcom were faced with regulating some 500 broadcasters most of whom were still in the process of putting in place arrangements for promoting equal opportunities and were on a learning curve at the time. In contrast the ITC only dealt with the regulation of a very much more limited number of broadcasters who may well have had such arrangements in place.
48. In 2005, following a separate request from BECTU, Ofcom disclosed raw data from equal opportunities returns for all terrestrial broadcasters. Mr Suter explained that this was information provided in error (at a time shortly after the commencement of FOIA) and did not properly reflect an understanding of Ofcom's statutory powers provided under the 2003 Act.
49. It was clear from the evidence before us and from reading the Decision Notice that neither Mr Morrissey nor the IC were provided with the full reasons why only summary statistics were published and the Request refused. As Ms Jolliffe said to us at the hearing if Mr Morrissey had been in possession of all of the facts the appeal may have proceeded differently.
50. From this evidence can we deduce whether or not the s.393(1) prohibition is dis-applied?

### ***The Appellant's case for disclosure***

51. Ms Jolliffe asks us to consider the questions in paragraph 12 above. Under s.58 FOIA the Tribunal has the power to undertake a merits review and in effect decide the case for itself. We are not bound by any findings of fact by the IC and can allow the appeal and/or substitute our own decision notice or dismiss the appeal. The only exception to this is where the notice involves an exercise of discretion by the IC. The notice in this case was issued under s.50 FOIA which states that the IC "shall make a decision unless" certain conditions are satisfied which are not relevant here. In this case we have decided to undertake a merits review.

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<sup>3</sup> Licensees are required to provide Ofcom with statistical information in relation to such matters as employment under condition 12(1) of their broadcasting licence and would be in breach of this condition if they did not comply.

52. Therefore whether or not the IC had sufficient evidence before him is not a matter which we need to consider because the Tribunal can make findings of fact upon which to base our decision. We have set out these findings in the evidential section above.
53. Ms Jolliffe then asks us to decide whether Ofcom made a decision that disclosure of the disputed information would not facilitate the carrying out of its duty to take all appropriate steps for promoting equality of opportunity.
54. We do not consider this is a question that has to be answered. Ofcom's duty under s.27(2)(a) is to firstly decide what steps they consider are appropriate for promoting equality of opportunity and then to take all those steps. It is not to take all steps which could promote equality of opportunity. We do not consider that Parliament intended that every step should be taken but only those that Ofcom considered appropriate in the circumstances to promote equality of opportunity. We find that by approving the publication of the 2005 Report that Ofcom had decided that the appropriate step was to publish the summary information only.
55. Having made this finding the next two issues at paragraph 12 c and d fall away. If the Board had decided that the disclosure of the raw data to Mr Morrissey and his union would have been an appropriate step for Ofcom to take for promoting equality of opportunity, such a step would have been within the powers conferred on Ofcom by s.27 of the 2003 Act. If the step had been taken then it would have come within a s.393(2)(a) function and disclosure would not have been prohibited under s.393(1). However this did not happen.
56. Ms Jolliffe's final issue (at paragraph 12 e but rephrased by us) is whether the IC and the Tribunal have jurisdiction to review Ofcom's s.27 decision, and if so was Ofcom's decision to withhold the requested information within the range of reasonable responses. We have rephrased the issue because we can only decide in this appeal whether or not to uphold the Decision Notice as the IC did not exercise a discretion by issuing the Notice. However we accept that when Ofcom decides what appropriate steps to take that it may be exercising a discretion.
57. Therefore we need to consider whether the Tribunal has the power to consider a challenge to the lawfulness of Ofcom's policy decision only to publish summary data. In other words Mr Morrissey's main ground of appeal as stated in his Notice of Appeal is directed to the issue of whether the IC erred in his consideration of the issue of "*whether Ofcom should in fact have considered it appropriate to disclose the information in pursuance of its functions with regard to section 27(2) of the Communications Act 2003*".
58. Ms Gallafent submits that Ofcom's position is that:
- i. The 2003 Act does not give rise to any relevant discretion on the part of Ofcom which is apt for review by either the IC or the Tribunal; and
  - ii. In any event, it is unarguable that Ofcom's decision not to disclose the requested information was irrational.
59. On the first point a differently constituted Tribunal in *Hoyte v IC & Civil Aviation Authority* EA/2007/0101 found that where there is a statutory prohibition on disclosure

and that there are exceptions to that prohibition that are governed by an exercise of discretion, the question for the Tribunal is whether the regulator exercised its discretion not to disclose the disputed information unlawfully in the sense of *Wednesbury* unreasonableness, irrationality or perversity.

60. Ms Gallafent seeks to distinguish the present case from *Hoyte* because it was concerned with s.23(1) of the Civil Aviation Act 1982 (CAA 1982). S.393 of the 2003 Act is similar to the extent that it also requires that:
- i. The information must be with respect to a particular business; and
  - ii. The information must have been obtained in exercise of a power conferred by the 2003 Act (or other relevant Broadcasting Acts).

However, the route by which the statutory prohibition on disclosure which would otherwise apply may be dis-applied is significantly different under s.393 to that provided for under s.23 of the CAA 1982 because it does not involve the exercise of any discretion under s.393(2).

61. Although we agree that there is not a discretion under s.393(2) we consider that a discretion arises under s.27 in that Ofcom decides what appropriate steps to take.
62. Ms Gallafent then argues that the important point of law which underlies the issue is whether the Information Tribunal would in any event be the appropriate forum in which to determine the rationality or otherwise of Ofcom's decision that it was neither necessary or appropriate to disclose the requested information in order to facilitate the carrying out of its statutory duties in relation to equal opportunities. She contends this is not an arid procedural point, but goes to the heart of the distinct roles of the Information Tribunal, which is a Tribunal specialist in issues of freedom of information, and the Administrative Court, which is the specialist forum whereby the decisions and policies of public authorities are subject to its inherent supervisory jurisdiction by way of judicial review on public law grounds. She contends that such issues are for the Administrative Court not the Tribunal and refers us to a line of decisions.<sup>4</sup>
63. Mr Hooper on behalf of the IC takes a different view. As Ofcom is a public authority, Mr Hooper accepts that any challenge to the lawfulness of Ofcom's policy must be advanced by reference to principles of public law. He considers Ofcom advances a procedural exclusivity argument. However, Mr Hooper considers that it is clear that the Tribunal can properly determine at least some types of public law challenge.
64. Where a statutory prohibition on disclosure is expressly made subject to a discretionary exception, the Tribunal may consider whether the public authority's failure to exercise that discretion in favour of disclosure is irrational in the *Wednesbury* sense and refers us to *Hoyte* at §53.

65. This in turn he submits reflects the following more general principle:

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<sup>4</sup> *Boddington v. British Transport Police* [1999] 2 AC 143, per Lord Steyn at 172F-G, *O'Reilly v Mackman* [1983] 2 AC 237 and *Jones v Powys Local Health Board and another* [2008] EWHC 2562 (Admin).

“... the primary focus of the rule of procedural exclusivity is situations in which an individual’s sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights<sup>5</sup> which cannot be determined without an examination of the validity of a public law decision.” (*Boddington v. British Transport Police* [1999] 2 AC 143, *per* Lord Steyn at 172F-G.)

66. Thus, Mr Hooper argues, in considering an appeal under s. 44 of FOIA in relation to a statutory prohibition on disclosure, the Tribunal can entertain a public law challenge to any act (or failure to act) on the part of the public authority in question if:

- i. that public law challenge is of the form that no decision-maker could lawfully have so acted (or omitted to act) in the circumstances (*e.g.* a claim that some decision was in substance irrational, as opposed to *e.g.* a reasons challenge or a challenge to the common law fairness of any decision-making process); and
- ii. but for that act or omission the public authority would not be able to rely on the statutory prohibition in question (whether because one of the statutory prohibition’s conditions is not met, or because some other statutory exception applies).

67. We agree with Mr Hooper’s submissions and find that the Information Tribunal, and for that matter the Information Commissioner, does have power to entertain a public law challenge to the limited extent set out in the previous paragraph and that the test we should apply is that set out in *Hoyte*, namely *Wednesbury* unreasonableness, irrationality or perversity.

68. We now turn to Ms Jolliffe’s challenge to the way that Ofcom exercised its s.27 powers. Her main submissions are that:

- i. Ofcom has given inconsistent evidence. On the one hand the Board did not consider it appropriate to disclose the raw data but on the other hand it has encouraged broadcasters to do it themselves because of the great benefit it will provide;
- ii. There is no contemporary evidence that the Ofcom Board considered whether or not it was appropriate to publish the raw data;
- iii. There is no obligation of confidence which can override FOIA;
- iv. There is no evidence that the broadcasters would not give consent to disclosure, rather the opposite from the replies to Mr Suter’s letter of 2 October 2007;
- v. The broadcasters are obliged to provide the raw data under their licence which can be enforced by sanctions and Ofcom should not have taken into account that it would make its job more difficult if it had been forced to take such action;

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<sup>5</sup> Strictly speaking, it may be that the right of access to information that is granted to individuals by s. 1(1) of FOIA is closer to a public law right than a private law right. But this can only weaken any argument for procedural exclusivity: if a court or tribunal is entitled to consider public law issues when adjudicating upon a matter of strict private law, the Information Tribunal (which is specifically tasked by Parliament to consider the quasi-public law rights that arise under FOIA) must *a fortiori* have power to consider such public law issues also.

- vi. The information requested would have been useful to the promotion of equal opportunities;
- vii. Mr Suter admits in his letter to Mr Morrissey of 2 October 2007 and in evidence that the information potentially has some benefit to promoting equal opportunities; and
- viii. The ITC had published some individual licensee employment statistics for 2003 and 2004 and Ofcom also did this in 2005.

69. Ms Jolliffe asks us to find that these matters amount to *Wednesbury* unreasonableness, irrationality or perversity.

70. Mr Hooper submits that the availability of this form of public law review in the Information Tribunal does not assist Mr Morrissey. He may well disagree with Ofcom's views as to how best to promote equality. However, in all the circumstances of this case, and given the applicable statutory scheme, he cannot show that Ofcom's policy in this regard is irrational in the sense that no reasonable decision-maker could have reached it because:

- i. Ofcom are the specialist regulator, and thus in the context of a *Wednesbury* review their views are entitled to considerable weight.<sup>6</sup>
- ii. The focus of ss. 27 and 337 is the promotion of equal opportunities in practice. Neither are directly concerned with (or expressly require) the publication of information on the performance of the broadcasting sector in this regard, let alone the performance of individual broadcasters.
- iii. Ofcom plainly has taken other active steps to promote equal opportunities, including the publication of a detailed toolkit for broadcasters and formal guidance.
- iv. Mr Suter's evidence is that the publication of employment statistics for individual broadcasters (*i.e.* going beyond the publication of an overall summary) could very well result in discouraging broadcasters from providing information of any kind in future which, although the IC does not agree with this assessment, he recognises that in the context of a *Wednesbury* review of the rationality of Ofcom's policy, Mr Suter's evidence in this regard is plainly entitled to some weight.

71. Therefore, Mr Hooper contends, it is not enough for Mr Morrissey to argue that the disclosure of the disputed information would be "an appropriate step" to promote equal opportunities under s. 27 of the 2003 Act. This may be right, but that does not mean that Ofcom's policy was not an appropriate alternative, or that Ofcom could not rationally take a different view.

72. In relation to the earlier disclosures of detailed statistics Mr Hooper says it is not clear from the evidence precisely how the ITC understood its statutory duties and functions. But insofar as it understood or applied them differently, that cannot in itself preclude Ofcom from adopting the policy in question if it is otherwise rational in a *Wednesbury* sense.

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<sup>6</sup> See *Wade and Forsyth on Administrative Law* (10<sup>th</sup> ed., 200) at pp. 132-134 and *R (Wildman) v. OFCOM* [2005] EWHC 1573 (Admin), *per* Stanley Burnton J (as he then was) at §§14 and 67

73. Ms Jolliffe seeks to rely on an earlier disclosure by Ofcom of similar information. Mr Hooper argues that as Mr Suter said it had been done in error it cannot affect the rationality of Ofcom's policy now.
74. As to Ms Jolliffe argument that Ofcom's policy cannot be rational because Ofcom itself stated in its letter of 2 October 2007 that there would be "*real value*" in the release of the requested information Mr Hooper says that we should look at the full wording used which is "*real value in licensees voluntarily publishing a breakdown of their individual performance statistics*" (emphasis added). The expression of such a view is plainly not inconsistent with the policy that Ofcom should itself publish only a summary of responses rather than the employment statistics of every broadcaster.

#### The Tribunal's conclusions and remedy

75. Whether the s.44 FOIA exemption is engaged depends on whether the disclosure of the requested information is prohibited by another statute, namely the Communications Act 2003. S. 393(1) of the 2003 Act prohibits Ofcom from the disclosure of information provided to it by broadcasters in exercise of its powers under the 2003 Act unless firstly the broadcaster has consented to the disclosure or secondly the disclosure is made by Ofcom to facilitate the carrying out of any of its functions (s.393(2)(a)).
76. There is no requirement under the 2003 Act for Ofcom to seek approval from broadcasters and in this case it did not. What it did do some time after the Request was to explain by way of letter to broadcasters why it was not disclosing the raw data provided by them and inviting them to provide the data to BECTU. Some broadcasters responded positively to this invitation and in two cases the parties agree that those broadcasters in effect consented to the raw data being disclosed to Mr Morrissey. As a result Ofcom has accepted that s.393(1) is not engaged for this data and therefore that the s.44 FOIA exemption is also not engaged and that the data should be disclosed to Mr Morrissey.
77. In relation to the second exception from prohibition the relevant function in this appeal is the promotion by Ofcom of equal opportunities in employment by broadcasters under s.27 of the 2003 Act. Where in the exercise of this function Ofcom requires to publish information this is not prohibited under s.393(1). Where Ofcom holds information which it does not require to publish to undertake the function it is prohibited from disclosure and a person who discloses it is guilty of an offence (s.393(10)).
78. Clearly what Parliament intended in relation to this appeal was that Ofcom could obtain information when exercising a power under the 2003 Act from the bodies it regulates but that Ofcom could only disclose/publish such information if it decided it needed to do so in order to carry out one of its functions or obtained the consent of the broadcaster to disclosure.
79. In this appeal Ofcom obtained employment statistics from broadcasters but decided that it was only appropriate to publish a summary of the data collected to fulfil its s.27 function. This is allowed because it engages s.393(2)(a) which has the effect of disapplying s.393(1) so as to enable Ofcom to publish the 2005 Report without committing an offence.



80. Mr Morrissey challenges that decision to only publish the summary data. What he in effect says through his counsel is that the publication of the full/raw data would promote equality of opportunity in employment amongst broadcasters and it was an appropriate step for Ofcom to take to fulfil its function under s.27 and that it was *Wednesday* unreasonable or irrational not to have made such a decision.
81. Ofcom challenges the Information Tribunal's ability to consider such matters. For the reasons set out in the decision at paragraphs 63 to 67 above we do not agree and consider we do have jurisdiction to consider the matter.
82. We have considered all the evidence and the submissions of counsel and cannot find that Ofcom took an irrational, unreasonable or perverse decision in a *Wednesday* sense. Ofcom decided that the appropriate steps to take in order to fulfil its function to promote equal opportunities among broadcasters at the particular time in question was to publish a summary of the data in the 2005 Report and to take two further steps, namely to publish guidance and consider co-regulation with BTRC. We find this was within a range of reasonable steps for Ofcom to take in the circumstances of this case.
83. Ms Jolliffe's challenge to the rationality of this decision as set out in paragraph 68 above does not in our view satisfy the *Wednesday* test for the reasons set out by Mr Hooper in paragraphs 70 to 72 above with which we agree.
84. We therefore find that the appeal should be dismissed except in relation to the two broadcasters who have given their consent to disclosure. We have provided a substituted decision notice limited to this disclosure only.
85. Our decision is unanimous.

### Observation

86. We would observe that Ofcom's handling of this case has possibly led to this appeal being pursued. Ofcom handled the Request, the internal review and the complaint before the IC in such a way that it was not clear why it had taken the steps it did in relation to the employment data obtained from broadcasters. If it had been clearer from the start it may have avoided this litigation.

Signed

John Angel  
Chairman

Date 11 January 2010



**IN THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)**

**RULING on an APPLICATION for PERMISSION to APPEAL**

**By**

**OFFICE OF COMMUNICATIONS**

1. This is an application dated 8 February 2010 by the Office of Communications (“Ofcom”) for permission to appeal part of the decision of the Information Tribunal (now a First Tier Tribunal in the General Regulatory Chamber), dated 11 January 2010. That decision largely dismissed the appeal of Gerry Morrissey and upheld the Information Commission’s decision notice dated 22 July 2009.
2. The right to appeal against a decision of the First Tier Tribunal (“FTT”) is restricted to those cases which raise a point of law. Such cases include those where the decision appealed against is ‘irrational’ in the true Wednesbury sense. In other words a decision which no reasonable Tribunal, having correctly directed itself in law and having taken into account all the relevant facts, could have reached.
3. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended (“the Rules”).
4. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application raise important points of law which can be more appropriately dealt with in the Upper Tribunal.
5. In this case the grounds of appeal advanced are clearly set out by Ofcom in its application and the FTT gives permission for Ofcom to appeal to the Administrative Appeals Chamber of the Upper Tribunal on the grounds advanced.

6. Under rule 23(2) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended Ofcom has one month from the date this Ruling was sent to it to lodge the appeal with:

The Upper Tribunal Office (Administrative Appeals Chamber),  
5<sup>th</sup> Floor, Chichester Rents,  
81 Chancery Lane, London,  
WC2A 1DD.  
DX: 0012 London/Chancery Lane.

**John Angel**  
Principal Judge  
First-tier Tribunal (Information Rights)  
11 February 2010