



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0279**

**Decided without a hearing  
On 14 January 2020**

**Before  
KAREN BOOTH  
JUDGE**

**MALCOLM CLARKE and JEAN NELSON  
TRIBUNAL MEMBERS**

**Between**

**DALE MCEWAN**

Appellant

**And**

**THE INFORMATION COMMISSIONER**

Respondent

**DECISION AND REASONS**

## DECISION

*(NB In this Decision: the Respondent is referred to as “the Commissioner”; the Freedom of Information Act 2000 is referred to as “FOIA”; and references to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)*

1. The decision notice issued by the Respondent on 16/7/19 (reference: FS50824907) is not in accordance with the law and the appeal is allowed. The following decision notice is substituted in its place.

### Substituted decision notice

- (a) Ofcom’s letter dated 15/10/19 to Mr McEwan suggests that information falling within the scope of Mr McEwan’s request for information dated 3/10/18 is held by Ofcom. On the balance of probabilities, further information falling within both parts of his request is also held by Ofcom.
- (b) Within 35 days Ofcom must conduct further searches for the information sought and (i) communicate all relevant information that it holds to Mr McEwan; or (ii) issue a fresh refusal notice, complying with section 17 of FOIA, in relation to any information which it considers is exempt from the rights conferred by section 1(1) of FOIA.

## REASONS

### *Background to the appeal*

2. Mr McEwan is a former employee of That’s Solent TV (“Solent”), a local independent commercial TV station. He is connected with a group called The Campaign for Professional and Relevant Local TV, which was formed in response to perceived performance issues relating to Solent
3. On 3/6/15, Ofcom contacted various local TV companies, including Solent, by email to request some short video clips of their programming to enable Content Board members to see examples of local programming. They were also asked to send a full recording of a recent episode of their main news programme.
4. According to Mr McEwan, Solent aired six (twenty-five minute) news bulletins between 5pm and 8.15pm at the relevant time. He asserts that Solent’s management wanted to send a full length recording of an episode that was aired on 23/6/15, but because there were technical issues with each of the bulletins aired during that time span the recording that was actually submitted to Ofcom was comprised of sections of each of the six bulletins that has been edited to look as if they were one live recording.
5. On 3/10/18, Mr McEwan submitted a FOIA request to Ofcom (page 87), the key part of which read as follows.

“I am requesting the following please: 1. A copy of the full-length video recording of the That’s Solent TV news programme that was submitted

to Ofcom as explained above. 2. A copy of all correspondence regarding this video recording.”

6. Ofcom initially responded (page 88) by saying that they did not hold the full-length recording but did hold a clip from the programme, which was extracted for the purposes of an internal presentation and which they were withholding in reliance on section 44 of FOIA. They said that they did not hold any information falling within part 2 of the request. Mr McEwan requested an internal review of the response (page 90). He mentioned his understanding that at least one complaint had been made to Ofcom by a member of the public in relation to the video clip. Ofcom reviewed their response (pages 91-92) and decided that they would after all provide the clip, but they continued to deny holding any of the part 2 information. They specifically said that they did not hold the 3/6/15 email from Ofcom nor any complaint information relating to Solent.

#### *The complaint to the Information Commissioner*

7. On 23/2/19, Mr McEwan complained to the Commissioner about Ofcom’s response to his request. He provided a copy of a letter dated 18/1/16 from Ofcom to a Mr F (page 94-96) headed “COMPLAINT ABOUT [SOLENT]”. In that letter, Ofcom explained its reasons for not pursuing a number of issues raised by Mr F in relation to the services offered by Solent. The last paragraph is headed “Accusation of edited recordings” and states that Ofcom had no grounds to suspect that Mr F’s suggestions in that respect were correct.
8. The Commissioner investigated the complaint. Ofcom sent a detailed response (pages 122-128) to the Commissioner’s enquiries.
9. On 16/7/19, the Commissioner issued her decision (page 1). She decided that, on the balance of probabilities, Ofcom did not hold any further information that fell within the scope of Mr McEwan’s request.

#### *The appeal to this Tribunal*

10. On 10/8/19, Mr McEwan appealed to this Tribunal. His grounds of appeal are summarised on pages 13-14, which is supplemented with a twelve-page submission and 51 pages of documentary evidence (some of which duplicates other documentary evidence in the bundle).
11. He wanted the Tribunal to ascertain the following:
  - why Ofcom had destroyed the full-length recording;
  - whether Ofcom holds the original recording that accompanied Mr F’s complaint and/or the further off-air recordings obtained in relation to that complaint – if they do, he wants that information to be disclosed to him and, if they don’t, he wants to know why;
  - why Ofcom has said that it does not hold information about any complaints about the full length recording from 2015 when the spreadsheet at pages 76-79 shows that they do hold complaint information from 2014 onwards for all local TV stations, including Solent;

- why the spreadsheet does not include any information about Mr F's complaint; and
  - why none of the complaints in the spreadsheet refer to a show with a transmission date of 23/6/15 when Mr F's complaint related to a bulletin from that date.
12. He also wanted the Tribunal to ensure that information about Mr F's complaint and all complaints relating to the full-length bulletin recording are disclosed to him and, if that information does not exist, to ascertain why.
13. The Commissioner's Response to the appeal is at pages 80-86.
14. Ofcom also submitted a Response (page 86a-b). This consisted solely of a copy of their reply dated 27/8/19 to a further FOIA request made by Mr McEwan on 27/7/19 (for answers to the points summarised in paragraph 11 above, bullet points 3 and 4).
15. Mr McEwan replied on 20/9/19 (bundle of additional open documents). That bundle also includes copies of further correspondence between Mr McEwan and Ofcom (Ofcom's letter dated 15/10/19 and his reply dated 25/10/19).

*The powers of the Tribunal*

16. The task of the Tribunal is set out in section 58 of FOIA:

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

*The issues*

17. The issue we had to determine was whether the Commissioner had correctly concluded, on the balance of probabilities, that Ofcom did not hold any further information that fell within the scope of the request.
18. The case law relating to the issue of whether information is held by a public authority has established that the test to be applied by the Commissioner is whether, at the relevant time and on the balance of probabilities, the authority held information that fell within its scope. On receipt of a complaint, it is for the Commissioner to investigate the adequacy of the search made by the public authority. Where the issue of whether information is held comes before the

Tribunal, it is our task to review the Commissioner's conclusions and we must also decide the issue on the balance of probabilities. We cannot demand certainty. We will need to be satisfied that the public authority has carried out a reasonable search (i.e. a search that has been conducted intelligently and reasonably). We need to consider all relevant factors, including the scope of the search and the rigour and efficiency with which it was conducted.

19. It was not for us to address Mr McEwan's other queries. Our task is to consider whether further information was likely to be held at the relevant time, not *why* it is not held nor why (if it was held at some stage) it is no longer held. Those matters are outside our remit.
20. Both parties requested a paper determination, rather than an oral hearing. The evidence consisted of the evidence in the open hearing bundle (pages numbered 1-138) and the evidence in the additional open bundle. We decided that we were able to decide the appeal without an oral hearing. This was a single-issue appeal, which did not involve any complex legal arguments. Mr McEwan had provided detailed, helpful submissions. There was ample paper evidence before us to enable us to decide this issue fairly and justly.

#### *Our decision*

21. For the following reasons, we decided that, on the balance of probabilities, Ofcom did hold further information falling within the scope of the request.
22. Ofcom was on notice from 2/12/18 (when Mr McEwan requested an internal review of Ofcom's response) of the possibility that a complaint had been made to Ofcom about the full-length recording. They were given details about Mr F's letter (although apparently, for reasons that are not clear, not the letter itself) by the Commissioner on 5/4/19 (page 119).
23. It was not until 15/10/19 (letter in additional open bundle documents) that Ofcom said they now realise that the references had been to Mr F's complaint, which they referred to as a compliance matter.
24. It is clear from Ofcom's letter that further information (relating to Mr F's complaint), some of which appears to fall within the scope of the request, is held by Ofcom.
25. It is not clear to us why it took so long for that information to come to light. And given that Mr F's complaint is described as a compliance matter, it is not clear to us why the full length recording (which appears to be referenced in the last paragraph of Ofcom's letter dated 18/1/16 – page 96) would not be retained for the five-year period referred to on page 127. The Ofcom letter dated 15/10/19 says that recordings related to the compliance complaint are not held "as our retention policy for retaining recordings is different here". But, as Mr McEwan has pointed out, they do not say what that retention policy is.
26. We were also surprised that the search terms referred to in the 3<sup>rd</sup> bullet point down on page 126 did not include "complaint" or similar. Ofcom have not said what further searches were undertaken to uncover the information referred to in their letter of 15/10/19.

27. Ofcom's letter dated 15/10/19 cast doubt in our minds about their handling of Mr McEwan's request generally. That letter was not before the Commissioner when she issued her decision notice.

*Conclusion*

28. For the above-mentioned reasons, we did not agree with the Commissioner's conclusion that Ofcom does not, on the balance of probabilities, hold any further information that is relevant to Mr McEwan's request. The appeal is allowed.

**Karen Booth**  
**Judge of the First-tier Tribunal**  
**Date: 23 February 2020**  
**Date Promulgated: 3 March 2020**