

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2014

Public Authority: Ofcom

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the information provided by Ofcom to the Home Office in response to its request for business cases for access to communications data. Ofcom refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that Ofcom has correctly applied section 36(2)(b)(ii).
3. The Commissioner requires no steps to be taken.

Request and response

4. On 23 April 2013, the complainant wrote to Ofcom and requested information in the following terms:

"A copy of the information provided to the Home Office in response to its request for business cases for access to communications data."
5. Ofcom responded on 22 May 2013. It stated that the information requested was exempt under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.
6. Following an internal review Ofcom wrote to the complainant on 5 June 2013. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 18 June 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether Ofcom was correct to apply section 36(2)(b)(i) and (ii) and section 36(2)(c) to the withheld information.

Background Information

9. Ofcom has explained that communications data is the context not the content of a communication. This includes who was communicating, when, from where and with whom but not the content of that communication.
10. It explained that currently communication records of phone contacts are collected by the communications industry for their own business purposes. It said that they are retained by them under the existing Data Retention Regulations (DRR). It explained that law enforcement, the intelligence agencies and some other public authorities such as Ofcom can seek access to these records if they can demonstrate that access is necessary, proportionate and is connected to a specific investigation or operation. This is currently regulated by the Regulation of Investigatory Powers Act (RIPA).
11. It said that policy is currently being formulated and developed in this area as more communications are now taking place on the internet and fewer communications by phone. For many internet-based services, the industry does not collect communications data as there is no business need to do so. Many service providers operate from abroad and so are not subject to the DRR. Communications records that are created are not being made available to investigating authorities at the required timeliness or quality. It said that this has a direct impact on their ability to investigate and prosecute crime in this country. The government is therefore looking to formulate and develop policy to address these concerns. The draft Communications Data Bill was published on 14 June 2012. It said that the government will bring forward proposals as soon as possible and this may involve legislation.

Reasons for decision

12. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

13. Ofcom has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) to the withheld information. The Commissioner has considered section 36(2)(b)(ii) first in this case.

14. In determining whether section 36(2)(b)(ii) was correctly engaged by Ofcom the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

15. Ofcom has explained that, Graham Howell, Secretary to the Corporation, is the qualified person in this case and his opinion was obtained on 22 May 2013. Ofcom has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.

16. The following submissions were put to the qualified person in relation to the application of section 36(2)(b)(ii):

- It is important that colleagues, when discussing developing areas of policy, can feel unconstrained in putting forward their views without inhibition.
 - To disclose such correspondence with a government department, would mean that Ofcom employees and their counterparts in that government department, would be less likely to discuss policy issues openly and explore all possible regulatory options.
17. The qualified person's response agrees that section 36(2)(b)(ii) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.
18. The withheld information is information provided to the Home Office by Ofcom to assist the Government in formulating and developing policy relating to communications data. It is an extremely sensitive area which is very much live and still under discussion within Government. The Commissioner therefore accepts that it was reasonable to conclude that disclosure of this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
19. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
20. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
21. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the

¹ EA/2006/0011; EA/2006/0013

Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

22. Ofcom has acknowledged that there is a strong public interest in ensuring that decisions made within government are open and transparent.
23. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding behind the decision making process and enables the public to contribute where possible in relation to policies which are going to have a significant affect upon them. Furthermore there is a public interest in the government being accountable for decisions made.

Public interest arguments in favour of maintaining the exemption

24. Ofcom has explained that it believes the following public interest arguments favour maintaining the exemption:

Safe Space

25. Ofcom has explained that the Policy being formulated is at a very early stage and is therefore very much a live issue. It said that it is recognised that good government requires a 'safe space' in order for officials to extend full and proper consideration to the formulation and development of policy. It said this safe space allows for a considered assessment of the respective merits or de-merits of specific courses of action, which is vital to the foundation and delivery of effective policy. It said that the value of the safe space resides in the freedom it affords officials and Ministers to partake in dialogue without the risk of premature partisan criticism that might misrepresent or otherwise inhibit discussion and debate.
26. Ofcom explained that the withheld information details how communications data is presently utilised by Ofcom, and how it might be utilised in the future should revised legislation confer such a right of access. It said that it serves to provide officials with a basis on which to

take forward policy formulation. It said that by understanding anticipated need, policy officials are better able to address the competing requirements to ensure that the policy delivered is effective, yet proportionate to the risk faced, and does not unjustifiably infringe on the life of the citizen. It argued that this is a challenging task, and given the inherent sensitivity around the issue, not a discussion that is best facilitated in the public forum.

27. Ofcom explained that as with any area of live policy, what is considered at one point may be revised, set aside or rediscovered at a later point. It said that in this respect, the withheld information has enduring relevance to the policy formulation and development cycle.
28. It argued that without this safe space the policy formulation and development process would be significantly more difficult. It said that if the withheld information were disclosed at this point the Government would need to provide justification for its formative discussions before it had reached the point of agreeing a finalised policy position.
29. Finally it said Home Office officials have consulted widely around communications data policy and will continue to do so where appropriate. It therefore concluded that whilst Ofcom considers a safe space is required in terms of disclosure of the withheld information, this does not mean the policy is being developed without any external input.

The Chilling Effect

30. Ofcom explained that the public is aware in a general sense that some public authorities make use of communications data for investigative purposes, and this is an issue repeatedly reported in the media. It explained that the withheld information goes beyond a general explanation, it provides detailed accounts of current activity and sets out the drivers behind potential future activity.
31. It said that given the sensitivity and legal technicalities inherent to the subject matter, it is important that policy officials feel able to seek the views of Ofcom and other investigative authorities to better inform the policy formulation process. It said it is important Ofcom feels able to clearly and unambiguously set out its position to the Home Office. This ensures that the advice which policy officials ultimately put to Ministers is as comprehensive and cogent as possible.
32. It confirmed that if the withheld information were disclosed, it is likely Ofcom would be less frank and candid when providing input in the future. It said that whilst it would not be prohibited from generally conveying its position, it would be less likely to present certain information about operational matters in such detail. Whilst disclosure

would not prohibit communication and input it would impair the quality and directness of such.

The Timing of the Request

33. Ofcom confirmed that proposals relating to this policy issue are in the process of being formulated and developed and will be brought forward by the Home Office at the earliest opportunity.

Balance of the public interest arguments

34. The Commissioner considers there is a public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible.
35. The Commissioner considers that good policy making depends on good decision making which depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure. Furthermore evidence based policy is considered to be more robust and experts or industry stakeholders may be reluctant to offer their opinions if there cannot be the assurance of non-disclosure. Finally government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely.
36. The Commissioner also considers that there is a strong public interest in Ofcom being able to provide input openly and candidly. There is a strong public interest in not disclosing information which may make public authorities reluctant to provide input into this policy area both now and in the future.
37. In this case the policy is still live and still being formulated which gives greater weight to the public interest arguments in favour of maintaining the exemption. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case to all the withheld information.

Right of appeal

38. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

39. 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.
40. 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

Pamela Clements
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