

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 April 2020

**Public Authority:** The Office of Communications (Ofcom)

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

### Decision (including any steps ordered)

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1. The complainant has requested information about 'Leaving Neverland: Michael Jackson and Me' - a documentary that had been broadcast on Channel 4. Ofcom has withheld information the complainant has requested under section 44(1) of the FOIA (prohibitions on disclosure).
2. The Commissioner's decision is as follows:
  - The information Ofcom is withholding is exempt from disclosure under section 44(1).
3. The Commissioner does not require Ofcom to take any remedial steps.

### Request and response

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4. On 24 June 2019 the complainant wrote to Ofcom and requested information in the following terms:

*"1) Full reasoning and explanation as to why Ofcom ruled against complaints relating to the showing of the 'Leaving Neverland' documentary aired by Channel 4 on 6/3/19 and 7/3/19.*

*2) An explanation as to why Ofcom failed to act on the large number of public complaints about this programme, which was clearly exposed as a 'witch hunt' against an individual who can no longer defend himself even before the programme was aired, full of lies and inaccuracies.*

*3) What investigation was carried out by Ofcom in relation to the complaints made against the programme?*

*4) Since these complaints of standard and factual inaccuracy were submitted to Ofcom, what procedures were carried out by Ofcom in order to ascertain whether further investigation was required?*

*5) Since at least several complaints were made with specific reference to Ofcom's own Code of Conduct (which the programmes clearly breached on numerous occasions), why did Ofcom adjudicate against these complaints and in favour of a programme which material and ethos was in breach of said Code of Conduct?*

*6) All correspondence, documents, notes, reports and transcripts of any telephone calls, and all e-mails relating to the enquiry into the 'Leaving Neverland' programmes."*

5. Ofcom responded on 16 July 2019. It addressed the queries the complainant asked in parts 1 – 5 of the request and withheld the information requested in part 6 under section 44 of the FOIA.
6. Following an internal review, Ofcom wrote to the complainant on 31 October 2019. It maintained its position.

### **Scope of the case**

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7. The complainant first contacted the Commissioner on 27 August 2019 to complain about the way his request for information had been handled.
8. Once it was eligible for further consideration, the Commissioner assessed the complaint. She advised the complainant that, in her view, the information being withheld under section 44 is exempt information. The Commissioner invited the complainant to withdraw his complaint, but he preferred to conclude the matter formally.
9. The Commissioner's investigation has therefore focussed on Ofcom's application of section 44(1) to the information the complainant has requested in part 6 of his request.

10. Because of the detail in its correspondence with the complainant and the nature of the requested information, the Commissioner did not consider it necessary to request a submission from Ofcom, or to view the information being withheld on this occasion. But she was, of course, prepared to contact Ofcom for further information if that had been necessary.

## Reasons for decision

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11. 'Leaving Neverland: Michael Jackson and Me' is a documentary that was broadcast in two parts on Channel 4 in March 2019. It was reported that Ofcom rejected hundreds of complaints against the documentary and part 6 of the complainant's request is for information about Ofcom's enquiry into that matter.
12. Section 44(1)(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it is not subject to the public interest test.
13. In its refusal of the request and internal review response, Ofcom explained to the complainant that it could not disclose the information he has requested in part 6 of the request, under section 393(1) of the Communications Act 2003 and section 44 of the FOIA. Ofcom explained that section 393(1) of the Communications Act 2003 prohibits it from disclosing information which relates to a business, and which it has obtained while undertaking its work, unless that business consents or one of the other statutory gateways is met.
14. Ofcom confirmed that it does not have Channel 4's consent to provide the information the complainant has requested, nor were any of the other statutory gateways met.
15. In its internal review, Ofcom addressed two arguments the complainant had raised, and did so satisfactorily in the Commissioner's view. First, the complainant argued that Ofcom has a legal duty to publish information about programmes that taxpayers have paid for. Ofcom confirmed that it had exercised its regulatory functions by publishing information about the television programmes in question in issue number 375 of its (Broadcast and On Demand) 'Bulletin', on 25 March 2019. Second, the complainant disputed that Channel 4 can be categorised as a 'business' and Ofcom confirmed that Channel 4 is a business within the meaning of section 393 of the Communications Act.

16. In correspondence to the Commissioner dated 27 March 2020, the complainant provided further arguments for the information's disclosure, which can be broadly summarised as follows:
- Any third party interests associated with the withheld information are protected by the FOIA exemptions under section 40 (personal data) and section 41 (information provided in confidence)
  - Channel 4 cannot be considered to be a 'business' – it is a 'hybrid entity' - and therefore section 393(1) of the Communications Act 2003 cannot be applied to it
  - A number of First-tier Tribunal (Information Rights) (FTT) decisions support the position that the information in this case should be released: EA/2012/0082, EA/2011/0183, EA/2009/0067, EA/2007/0101
  - The programmes in question breached the human rights of Michael Jackson and his family
  - The Commissioner should apply the public interest test in this case
17. Bullet points two and three are relevant here. Regarding the remaining points, if section 44 is engaged, sections 40 and 41 are not a consideration; matters of human rights are not relevant in this case; and, as mentioned, section 44 is an absolute exemption and not subject to the public interest test.
18. Ofcom advised the complainant in its internal review that Channel 4 is a business within the meaning of section 393 of the Communications Act. The complainant has described Channel 4 as a 'hybrid entity' without explaining what he means by that description. In any case, the Commissioner notes that, while publicly owned, Channel 4 is largely commercially self-funded; paying for itself through the sale of on-air advertising, programme sponsorship, and the sale of any programme content and merchandising rights it owns, such as overseas sales and video sales. The Commissioner is satisfied that Channel 4 can be categorised as a business and that any reasonable person would consider the same.
19. The Commissioner has reviewed the FTT decisions the complainant has referenced. EA/2012/0082 concerned regulation 12(5)(b) of the Environmental Information Regulations (course of justice) and Northern Ireland Water. The Commissioner can see little of relevance in that decision to this case.
20. EA/2011/0183 concerned section 44 of the FOIA but the public authority was Wrightington, Wigan and Leigh NHS Foundation Trust and the

circumstances were entirely different to the current case. EA/2009/0067 concerned both Ofcom and section 44 but the broadcasters in that case had consented to the information's release, which is not the case here. EA/2007/0101 also concerned section 44 but the authority was the Civil Aviation Authority and, again, the circumstances were entirely different. The Commissioner does not consider these FTT cases present a compelling case for section 44 not being engaged in the current case.

21. The Commissioner has noted her decision in FS50559898. That case also concerned Ofcom, section 393 of the Communications Act and section 44 of the FOIA. The Commissioner found that section 44 was engaged.
22. The Commissioner is satisfied that, in the current case, Ofcom obtained the relevant information that it holds (which falls within the complainant's request for correspondence, notes, reports, phone call transcripts and emails about complaints about a particular television programme) from Channel 4 during the course of its work as a regulator. The Commissioner is also satisfied that the Communications Act prohibits Ofcom from disclosing this information, that Channel 4 has not consented to the information's release and that there is no statutory gateway that would permit the information to be released.
23. The Commissioner's decision is that Ofcom is entitled to rely on section 44(1) of the FOIA to withhold the information the complainant has requested.

## **Right of appeal**

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

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

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

25. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## **Signed**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**