

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2023

Public Authority: Department for Culture, Media & Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information concerning the terms of appointment of non-executive members of Channel 4 Television Corporation and their oversight of their performance by Ofcom.
2. The Department for Culture, Media & Sport (DCMS) initially confirmed that they held some information within scope of the request and provided this to the complainant. However, they adopted an overly narrow interpretation to the request which excluded relevant emails. This error was not recognised at internal review but was rectified following further correspondence from the complainant, when DCMS disclosed to the complainant some further information (emails) which were within scope of the request. Some information contained in the emails was withheld (redacted) under sections 40(2)(third party personal data) and 42(1)(legal professional privilege) of FOIA.
3. The Commissioner has found that DCMS breached sections 1(1) and 10(1) of FOIA in their handling of the complainant's request. The Commissioner is satisfied, on the balance of probabilities, that DCMS do not hold any further relevant information within scope of the request.
4. The complainant did not dispute the exemptions applied by DCMS to the information held.
5. No steps are required.

Request and response

6. On 13 February 2023, the complainant wrote to DCMS and requested information in the following terms:

"Please could you tell me whether the DCMS is currently in possession of copies of the terms of appointment as set out in the C4 board NED and Chair's contracts.

This would either be in the form of the contracts themselves or template contracts.

Can you please also tell me:

- When DCMS came into possession of these terms
- Whether it was in possession or aware of these terms in January or February 2022
- Whether it had sign off on these terms
- Whether it would be made aware of or have input into changes to these terms.

As well as providing copies of any documents relating to contractual clarification of Ofcom's oversight of the performance of C4's NEDs, and the contractual requirement of C4 NEDs to adhere to the Cabinet Office Code of Conduct for Board Members of Public Bodies.

You do not need to provide the terms – I am in possession of these through Ofcom – this request is about DCMS's awareness of the terms, role in approving or amending them, and specific role in changes to the terms described in the above paragraph, which were at some point amended per an addendum".

7. Having not received a response to the request, the complainant wrote to DCMS on 14 March 2023 and advised them that as they were in breach of the statutory timeframe for a response under FOIA, he would be complaining to the Commissioner.
8. DCMS provided the complainant with a belated response to the request on 22 March 2023. They apologised for the time which they had taken to respond and advised that the department did hold information within the scope of the request.
9. DCMS confirmed that they were in possession of a template and that they had come into possession of the terms on 8 April 2022. They confirmed that they were not in possession of or aware of these terms in January or February 2022.

10. DCMS advised that they do not sign off the terms of appointment, and that the terms of appointment for non-executive members of the Channel 4 Television Corporation (C4C) Board are the responsibility of Ofcom, in line with their statutory role as the appointing authority for the C4C Board's non-executive members.
11. DCMS explained that Ofcom shared a template copy of the C4C non-executive member and Chair terms of appointment with DCMS as part of discussions about a live case that DCMS and Ofcom were in contact over. This resulted in Ofcom updating the terms via an addendum, which DCMS attached to the response to the request.
12. The department advised that some information had been redacted under section 40(2) and that the redacted names were not individuals in the public eye.
13. The complainant requested an internal review on 22 March 2023. He stated that he did not believe that the response covered all the information requested and clarified that:

"For clarity, the addendum you have attached clarifies Ofcom's oversight of the performance of C4 NEDs, and the contractual requirement of C4 NEDs to adhere to the Cabinet Office Code of Conduct for Board Members of Public Bodies.

Therefore, any correspondence between DCMS and Ofcom regarding, discussing or otherwise relating to the terms, as well as internal correspondence and documentation at DCMS relating to this matter, would be covered by my request, as above. This would be up to February 13th 2023, when I made this request".
14. The complainant also stated that, "my request would also cover the date you came into possession of the addendum, although that should be clear from the correspondence. Please provide either way".
15. DCMS provided the complainant with their internal review on 19 April 2023. The review found that the original response to the request had been correct and that some of the information previously disclosed was appropriately redacted under section 40(2) of FOIA.
16. DCMS informed the complainant that, "as you have now made a wider request" that this would be dealt with as a new FOI request and that they would respond by 24 April 2023.
17. The complainant wrote to DCMS on 19 April 2023 and stated that it was not the case that he had expanded his request as DCMS had stated. He noted that:

"Your initial response did not provide 'copies of any documents relating to contractual clarification of Ofcom's oversight of the performance of C4 NEDs, and the contractual requirement of C4 NEDs to adhere to the Cabinet Office Code of Conduct for Board Members of Public Bodies', as requested in my original request. You did not provide any reason for not providing this information under FOIA".

18. The complainant noted that he had asked DCMS to rectify this in their internal review, and provide detail as to what this information would include, and they had still not responded to that part of his request.
19. The complainant informed DCMS that he would be raising the matter with the ICO, along with the initial breach of section 10 of FOIA. For clarity, the complainant confirmed that he was not challenging the section 40(2) redactions which DCMS had made to the information which they had already disclosed to him.
20. DCMS wrote to the complainant on 24 April 2023. Their letter made no reference to the complainant's correspondence of 19 April and carried a new reference number for the alleged wider request.
21. DCMS advised the complainant that in addition to the addendum which they had previously disclosed under the original request reference number, they also held four email chains relating to the contractual clarification of Ofcom's oversight of the performance of Channel 4 non-executive directors. DCMS disclosed the four email chains to the complainant but advised him that some information contained in the emails was exempt from disclosure (redacted) under section 42(1)(legal professional privilege).

Scope of the case

22. The complainant contacted the Commissioner on 19 April 2023 to complain about the way his request for information had been handled.
23. Specifically, the complainant confirmed that he wished to complain about DCMS's breach of section 10 and that they did not respond to all parts of his request. He noted that in providing their internal review of 19 April 2023, DCMS had still not responded to all parts of his request.
24. During the Commissioner's investigation, the complainant confirmed that he did not dispute the exemptions applied by DCMS in this case (i.e. sections 40(2) and 42(1)). However, the complainant did want the Commissioner to determine whether DCMS had correctly interpreted and processed his original request of 13 February 2023.

25. The Commissioner considers that the scope of his investigation is to determine whether DCMS complied with sections 1 and 10 of FOIA.

Reasons for decision

Section 1(1): General right of access to information

26. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under the Act to create new information in order to answer a request.
27. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
28. In the circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, DCMS holds (or held at the time of the request) recorded information that falls within the scope of the request.

The position of DCMS

29. As part of his investigation, the Commissioner asked DCMS to provide details of the checks and searches which they carried out to ascertain the extent of information held within scope of the complainant's request, and why these checks and searches would have identified and retrieved all relevant information.
30. In submissions to the Commissioner, DCMS advised that relevant colleagues were asked to conduct searches of their email inboxes for all materials relevant to the request, as well as searching through files stored in the department's Google Drive. DCMS stated that this method was appropriate as it ensured that all records held by individuals involved in the matter that formed the basis of the complainant's request, were identified.
31. The Commissioner also sought confirmation from DCMS that the four (redacted) email chains disclosed to the complainant on 24 April 2023 were the entirety of the relevant information held by DCMS (other than the addendum provided to the complainant in the department's original response of 22 March 2023). In submissions to the Commissioner,

DCMS confirmed that they held one further email chain within the scope of the request (i.e. additional to the four previously disclosed to the complainant) and that this was exempt from disclosure in its entirety under section 42(1) of FOIA.

32. In submissions to the Commissioner, DCMS explained why they had treated the complainant's request for an internal review of 22 March 2023 as a wider (i.e. new) information request. DCMS advised that as the complainant's original request of 13 February 2023 had requested "copies of any documents", they had focussed their response on 'documents', which they did not consider to include email correspondence. Once the complainant had clarified (in his internal review request) that he was also seeking "any correspondence" relating to the matter, DCMS had disclosed the four redacted email chains to him on 24 April 2023.

The position of the complainant

33. In submissions to the Commissioner, the complainant stated that:

"An email is a type of document. A request for 'any documents' does not exclude emails any more than it excludes letters, memos, notes, summaries, reviews etc. These are all types of document".
34. The complainant contended that, "it is, at least, objectively possible to interpret documents as including emails, which was the intent of my request, so if DCMS failed to clarify, that would also be a breach of Section 16, would it not?"
35. As evidence in support of his contention that 'documents' will encompass/include emails, the complainant directed the Commissioner to an article in The Independent which referred to documents being handed over to the House of Commons Privileges Committee for their investigation into 'partygate'¹. The complainant noted that the documents in that instance included email invites and resignation emails.
36. The complainant also highlighted that the definition of 'documents' used by The Tribunal Procedure (First-tier Tribunal) (General Regulatory

¹ [Boris Johnson ordered to hand documents to partygate investigators | The Independent](#)

Chamber) Rules 2009², states, ‘‘Document’’ means anything in which information is recorded in any form’.

Commissioner’s decision

37. The Commissioner considers that the complainant is correct in his contention that emails are a type of ‘documents’ as they record information. Therefore, when the complainant submitted his information request for “copies of any documents” to DCMS on 13 February 2023, the scope of his request encompassed any relevant emails held by DCMS. In not recognising that the emails which they held were within the scope of the complainant’s request, and in not providing the complainant with these in their response of 22 March 2023, DCMS breached section 1(1) of FOIA.
38. Therefore, to be clear, the complainant should not have needed to further clarify his request, as he did in his request for an internal review on 22 March 2023 when he stated that his request would include any relevant ‘correspondence’ (external or internal), for DCMS to confirm that they held relevant emails and disclose redacted copies of the same to him.
39. However, the Commissioner can understand and appreciate how DCMS adopted an overly narrow interpretation of ‘documents’ in their initial response to the request, such that it excluded emails. For a central government department in particular, ‘document’ implies or suggests a degree of formality or information of significant importance, such that such documents (electronic or hard copy) will usually be stored or recorded in a specific location within that department. Emails can contain information of importance and significance, but many emails will be trivial or ephemeral in nature. Consequently, emails will not be so readily recognisable as ‘documents’, unlike, for example, a briefing for a Minister or a policy document.
40. Emails are, however, readily recognisable as ‘correspondence’ (as DCMS recognised in this case), and where a requester is seeking any relevant emails held by a public authority, they will often specifically ask for emails or ‘correspondence’, rather than “copies of documents”.
41. The Commissioner accepts and appreciates that the complainant had intended his information request of 13 February 2023 to encompass emails (i.e. when he asked for “copies of any documents”) but it would

² [The Tribunal Procedure \(First-tier Tribunal\) \(General Regulatory Chamber\) Rules 2009 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672222/ICO-Rules-2009.pdf)

have been helpful if the request had been more clearly worded to that effect (i.e. if the request had asked for emails or correspondence).

42. It is apparent from DCMS's response that they had not regarded the complainant's request as ambiguously worded, such that they should have sought clarification from the complainant, but rather they had misinterpreted the request by adopting an overly narrow interpretation of 'documents'. Therefore, whilst the Commissioner considers that DCMS breached section 1(1) of the Act by misinterpreting the complainant's request, he does not consider that there was any breach of section 16 (advice and assistance) of the Act by DCMS.
43. In the event, DCMS's original misinterpretation of the request did not mean that the complainant was denied information to which he was entitled, since DCMS disclosed the relevant (redacted) emails held to him as soon as they recognised that this was information which he was seeking.
44. Based on the submissions provided, the Commissioner is satisfied that DCMS carried out reasonable and proportionate checks and searches for information within scope of the complainant's request, and that, on the balance of probabilities, DCMS do not hold any further relevant information beyond that already disclosed to the complainant (other than the information redacted from the emails under sections 40(2) and 42(1)).

Section 10 – time for response

45. Section 10(1) of FOIA provides that public authorities must comply with section 1(1) of FOIA promptly and in any event not later than the twentieth working day following the date of receipt.
46. In this case the complainant submitted his request on 13 February 2023 and DCMS did not provide a response until 22 March 2023. As this exceeded 20 working days, DCMS breached section 10(1) of the Act.

Right of appeal

47. 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

48. 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.

49. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**