

Reference: 1631262

Information Rights  
Information.requests@ofcom.org.uk

9 August 2023

## Freedom of Information: Right to know request

Thank you for your request for information about investigation into ITV and Sky News further to claims made by Nicola Bulley's family in relation to harassment.

We received this request on 14 June 2023 and have considered it under the Freedom of Information Act 2000 ("the Act"). We wrote to you on 12 July 2023 to say we needed more time to consider the public interest in releasing or withholding the information. We have now concluded that consideration.

### Your request

*You asked: 'On the 21st of June OFCOM issued a Tweet that said "We are extremely concerned to hear the comments made by the family of Nicola Bulley about two broadcast licensees.'*

*We have written to ITV and Sky to ask them to explain their actions. We will then assess whether any further action is required."*

*As you will know, this relates to the events surrounding the death of Nicola Bulley, and the media circus that ensued. Further to this tweet OFCOM have issued no statements, and neither ITV or Sky have issued any statements. This is highly unusual given the amount of coverage at the time.*

*Please publish the following documents relating to the above incidents:*

- 1: The full text of the requests that were made to Sky and ITV including any surrounding correspondence.*
- 2: The full text of the responses from Sky and ITV including any surrounding correspondence.*
- 3: Internal emails from within OFCOM discussing this affair from the date of the issue up to the current date (14th June 2023).'*

## Background

By way of background, it is worth clarifying that for Broadcasting Fairness and Privacy related matters, Ofcom's initial steps would be to consider whether there may have been a breach of the Broadcasting Code (or other Ofcom codes or licence conditions). This initial 'consideration' stage involves contacting various parties involved in the matter to get a better understanding of the matter and to help us gather information to enable us to make a fair and logical decision on whether we should launch an investigation. Timelines to this process usually vary on a case-by-case basis dependent on the severity and sensitivity of the matter.

In cases where Ofcom considers there may have been a breach, it will launch an investigation. The possible outcomes of an investigation are that we judge an issue is in breach, resolved or not in breach of our rules. Ofcom's Broadcast and On Demand Bulletin, published every fortnight on our website, includes decisions about the complaints we have considered.

The Broadcast and On Demand Bulletin (the "Bulletin") covers a range of cases, including those which Ofcom has escalated for full investigation, and those which, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation. The [Bulletins](#) can be accessed on our website.

## Our Response

While we do hold information connected to items 1 and 2 of your request, we consider that disclosure of this information is exempt under the Act. In particular, section 44(1)(a) of the Act exempts disclosure of information if its disclosure is prohibited under another enactment. Ofcom is prohibited under section 393 of the Communications Act 2003 ('the Communications Act') from disclosing information about a business which we have obtained in the course of exercising a power conferred by among other legislation, the Communications Act, unless we have the consent of that business or one of the statutory gateways under section 393(2) of the Communications Act is met, neither of which applies here. Section 44 is an absolute exemption and therefore is not subject to a public interest test.

We can confirm we do hold information in response to item 3 of your request. We consider the information to fall under the following categories:

- We hold some internal emails forwarding and discussing details of the matter. We consider this information to be exempt from disclosure under section 44(1)(a) of the Act which exempts disclosure of information if its disclosure is prohibited under another enactment, as detailed above.
- We hold some emails containing internal discussions on the approach to the investigation. We consider this information to be exempt from disclosure under section 36(2)(b) of the Act. Section 36 is a qualified exemption, which means that Ofcom is required to consider whether or not the public interest in disclosing the information you have requested

outweighs the public interest in withholding the information. In this case, we consider that the public interest favours withholding the information for the reasons set out in Annex B to this letter. In Annex A of this letter, the qualified person for Ofcom – the Corporation Secretary – has confirmed that this exemption applies.

- We hold some internal emails obtaining and discussing legal advice in respect of this matter. However, we consider this information to be exempt as it falls under the exemption in section 42 of the Act. This section deals with the exemption of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. In applying this exemption we have had to balance the public interest in withholding the information against the public interest in disclosing the information. The attached Annex C to this letter sets out the exemption in full, as well as the factors Ofcom considered when deciding where the public interest lay. Please note that other exemptions may also apply to this information.

I hope this information is helpful. If you have any further queries, then please send them to [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk) quoting the reference number above in any future communications.

Yours sincerely,

Information requests

If you are unhappy with the response you have received in relation to your request for information and/or consider that your request was refused without a reason valid under the law you may ask for an internal review. If you ask us for an internal review of our decision, it will be subject to an independent review within Ofcom.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

#### **Timing**

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for responding to internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exceptional cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk).

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. Further information about this, and the internal review process can be found on the Information Commissioner's Office [here](#). Alternatively, the Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Annex A

### **Section 36 exemption**

The information we hold that falls within the scope of your request is being withheld as it falls under the exemption in section 36 of the Freedom of Information Act 2000 (the Act). I am a "qualified person" as referred to section 36(2) of the Act and duly authorised by a Minister of the Crown for the purposes of that section.

In my reasonable opinion, disclosure of the information requested would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, and would otherwise, or would be likely otherwise to, prejudice the effective conduct of public affairs. In applying this exemption, I have had to balance the public interest in withholding the information against the public interest in disclosing the information.

I have set out in Annex B the exemption in full, as well as the factors I considered when deciding where the public interest lay in relation to the information concerned.

If you have any queries about this letter, please contact [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk).

Date: 9 August 2023

Corporation Secretary

**Annex B**

<p><b>Section 36: Prejudice to effective conduct of public affairs</b></p> <p>Section 36 exempts information whose disclosure would, or would be likely to, have any of the following effects:</p> <ul style="list-style-type: none"> <li>• inhibit the free and frank provision of advice,</li> <li>• inhibit the free and frank exchange of views for the purposes of deliberation, or</li> <li>• otherwise prejudice the effective conduct of public affairs.</li> </ul> <p>Key points:</p> <ul style="list-style-type: none"> <li>• Section 36 can only be used if, in the reasonable view of a "qualified person", disclosure of the requested information would have one of the specified effects.</li> <li>• In this case, it is considered that disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.</li> <li>• The application of section 36 is subject to a public interest balance.</li> </ul>	
<p><b>Factors for disclosure</b></p> <ul style="list-style-type: none"> <li>• Transparency of Ofcom’s engagement with broadcasters on issues such as those relating to public safety.</li> <li>• The general desirability that Ofcom’s activities as the UK’s communications regulator are transparent.</li> </ul>	<p><b>Factors for withholding</b></p> <ul style="list-style-type: none"> <li>• Ofcom as the communications regulator needs to be able to engage with broadcasters when considering a matter, and colleagues need to consider and discuss approaches to these matters and engagement with stakeholders.</li> <li>• The threat of disclosure of these documents containing internal working level discussions among Ofcom staff could lead to misinformation on a broadcasting matter as well as inhibit the team’s ability to perform their role effectively in the future. It is therefore important that information relating to these issues is handled carefully.</li> </ul>
<p><b>Reasons why public interest favours withholding information</b></p>	

- We consider that the public interest in withholding disclosure outweighs the public interest in disclosure. Ofcom, as the communications regulator, needs to freely discuss approaches to matters involving broadcasters. As this is a matter that is still being considered, it is important to avoid inhibiting Ofcom's ability to investigate matters and avoid any miscommunications on the matter that is subject to this request, given that our consideration of the issues raised has not yet concluded.

## Annex C

<b>Section 42 – Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.</b>	
<b>Factors for disclosure</b>	<b>Factors for withholding</b>
<ul style="list-style-type: none"><li>• Promotes public confidence and transparency.</li></ul>	<ul style="list-style-type: none"><li>• The documents in scope are connected with the giving or obtaining of legal advice. Ofcom’s internal legal advice is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. It is advice given by Ofcom’s own salaried in-house legal advisers and is connected with the giving or obtaining of legal advice.</li></ul>
<b>Reasons why public interest favours withholding information</b>	
<ul style="list-style-type: none"><li>• It is in the public interest that decisions taken by Ofcom are taken in a fully informed legal context, where relevant. Ofcom therefore needs high quality effectively obtained legal advice for the effective conduct of its business. That advice needs to be given in context, and with a full appreciation of the facts. It needs to be sought and given in a timely fashion to ensure that policy develops in a fully informed way.</li><li>• Legal advice cannot be effectively obtained unless Ofcom is able to put all the facts before its in-house legal advisers without fear that they may afterwards be disclosed and used to its prejudice. Without such effectively obtained advice, the quality of Ofcom’s decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.</li></ul>	