

Reference: 01626838

Information Requests
information.requests@ofcom.org.uk

28 July 2023

Freedom of Information request: Right to know request

Thank you for your request for documents, memos and emails on GB News and news programming. Your request was received on 2 June 2023 and we have considered it under the Freedom of Information Act 2000 (the “FOI Act”).

Your request

Any documents, memos, emails held by either the Broadcasting Licensing unit at Ofcom or Dame Melanie Dawes as to whether and when the output of GB News constitutes news programming and so falls under Rule 5.

Any documents, memos, emails held by either the Broadcasting Licensing unit at Ofcom or Dame Melanie Dawes created prior to the time of GB News licence application as to whether the output of that channel would constitute news programming and so fall under Rule 5, including any correspondence with Government Ministers on this topic.

I am aware of the restrictions placed upon you by section 393 of the Communications Act 2003. To be clear, I am not seeking information provided to you by GB News; instead, I want information on your own internal and consideration assessment of this issue (which will therefore fall outside the scope of section 393).

Our response

By way of background, [Section 5 of the Broadcasting Code](#) is concerned with due impartiality and due accuracy across different types of programming. In particular, Rules 5.1, 5.2 and 5.3 specifically relate to due impartiality and due accuracy in news programming only, and the remaining Rules in Section 5 apply to all types of programming, including news. We have therefore interpreted your request to seek information relating to the application of Rules 5.1, 5.2, or 5.3 to programming on GB News.

I can confirm that we do hold the requested information. However, we consider these documents are exempt from disclosure for the following reasons:

- One of the documents comprises an email briefing to Dame Melanie Dawes, providing an update on and assessment of issues relating to licence applications, including for the GB

News channel. We consider that the information in this document is exempt from disclosure under section 36(2)(b) of the FOI 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 – Chief Operating Officer and Group Director Corporate – has confirmed that this exemption applies.

- The information contains legal advice, or the discussion of legal advice. We therefore consider that this information is exempt from disclosure under section 42 of the FOI Act. This exemption deals with information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Section 42 is a qualified exemption, which means we have had to consider whether or not the public interest in disclosing the information you have requested outweighs the public interest in withholding it. The attached Annex C to this letter sets out the exemption in full, as well as the factors for and against disclosure of the information you have requested when deciding where the public interest lay.

By way of background, you may find it helpful to see our announcements into investigations we recently opened into GB News broadcasts, relating to compliance with the Rules under Section 5:

- *State of the Nation* ([New investigations into GB News and Talk TV, 3 July 2023](#))
- *Saturday Morning with Esther and Philip* ([Bulletin – new investigations launched](#) – Bulletin issue number 471)
- “Don’t Kill Cash” campaign ([Ofcom launches investigation into Don’t Kill Cash campaign on GB News, 7 July 2023](#))

Ofcom publishes decisions in our [Broadcast and On Demand Bulletin](#), which is updated every fortnight on our website, and contain detailed reasoning on the issues raised and decision made. Once the above investigations have been concluded, our decisions will appear on the Bulletin.

If you have any further queries, then please send them to 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

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

Freedom of Information: Right to know request

Section 36 exemption

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 relevant information requested would 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.

Signed:

Melissa Tatton

Chief Operating Officer and Group Director Corporate

Date: 28 July 2023

Annex B

Section 36: Prejudice to effective conduct of public affairs

Section 36 exempts information whose disclosure would, or would be likely to, have any of the following effects:

- inhibit the free and frank provision of advice,
- inhibit the free and frank exchange of views for the purposes of deliberation, or
- otherwise prejudice the effective conduct of public affairs.

Key points:

- 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.
- In this case it is considered that disclosure would prejudice the effective conduct of public affairs.
- The application of section 36 is subject to a public interest balance.

Factors for disclosure	Factors for withholding
<ul style="list-style-type: none">• The general desirability that Ofcom's activities as the UK's communications regulator are transparent.	<ul style="list-style-type: none">• In order to run the organisation effectively, Ofcom's Chief Executive needs to be able to be informed of and internally discuss any issues relevant to Ofcom's regulatory activities. The correspondence with Ofcom's Standards and Senior Management team ensures that Ofcom's Chief Executive is appropriately informed, prepared for, and kept abreast of these issues.• The threat of disclosure of this internal correspondence would substantively inhibit the Chief Executive's ability to perform their role effectively in future.
Reasons why public interest favours withholding information	
<ul style="list-style-type: none">• We consider that the public interest in disclosure of information relating to the consideration of licence applications and regulatory updates is outweighed by the need for Ofcom's Chief Executive to be appropriately informed of these issues. Disclosure would likely inhibit the ability of the Chief Executive and Senior Management Team to run Ofcom effectively.	

Annex C

Section 42: Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.	
Factors for disclosure	Factors for withholding
<ul style="list-style-type: none">• Transparency and public confidence in regulated activities.	<ul style="list-style-type: none">• Ofcom considers the internal legal advice in relation to the application of Section 5 of the Broadcasting Code constitutes information 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.
Reasons why public interest favours withholding information	
<ul style="list-style-type: none">• It is in the public interest that decisions taken by Ofcom in the context of regulated activities are taken in a fully informed legal context, where relevant. Ofcom therefore needs high quality 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 decisions are taken in a fully informed way.• Legal advice cannot be effectively obtained unless Ofcom is able to put all the facts before its legal advisers without fear that they may afterwards be disclosed. Without such effective legal 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.	