

Reference: 01668955

Information Requests
information.requests@ofcom.org.uk

6 October 2023

Freedom of Information request: Right to know request

Thank you for your request concerning online safety and proposals in Australia to scan messaging services. Your request was received on 8 September 2023 and we have considered it under the Freedom of Information Act 2000 ('the FOI Act').

Your request

"All correspondence between [REDACTED], Online Safety, and [REDACTED] at Australia's eSafety Commissioner, on the topic of the Online Safety Bill and/or similar proposals in Australia to scan messaging services for child exploitation material, between October 1, 2022 and September 1, 2023."

Our response

We can confirm that we do hold information within the scope of your request, specifically emails of the nature outlined within the request. We are unable to disclose all of this correspondence as we consider that certain exemptions will apply under the FOI Act.

We consider that these emails are exempt from disclosure under section 36 of the FOI Act. In particular, sections 36(2)(b)(ii) and (c) of the FOI Act provide that information held by a public authority is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure of the information -

- Would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, and
- Would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs.

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, the Corporation Secretary for Ofcom, has confirmed that the exemption applies.

In addition, we also consider that some of the information within the scope of this request will be exempt from disclosure under section 44 of the FOI Act. Under section 44 of the FOI Act, information

is exempt from disclosure if its disclosure is prohibited by or under any enactment. In this case, section 393(1) of the Communications Act 2003 (the “Communications Act”) prohibits the disclosure of information about a particular 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 apply here. Section 44 is an absolute exemption under the Communications Act and does not require a public interest test.

Some of the emails captured by the request also contain personal information about a number of Ofcom colleagues and third parties. We consider that this information is exempt from disclosure under Section 40(2) of the FOI Act, which provides that personal information about persons other than the requester is exempt where its disclosure would contravene any of the data protection principles in the General Data Protection Regulation and the Data Protection Act 2018. Section 40 is an absolute exemption under the Act and does not require a public interest test.

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

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. 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.

Date: 5 October 2023

Corporation Secretary

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:
 - inhibit the free and frank exchange of views for the purposes of deliberation, and
- The application of section 36 is subject to a public interest balancing test.

Factors for disclosure

- The general desirability that Ofcom’s activities as the UK’s communications regulator are transparent.
- Transparency of Ofcom’s engagement with external organisations, such as the Esafety Commission, on issues of regulation, may lead to greater awareness of, and trust in, how Ofcom operates as a regulator and how it performs its duties.

Factors for withholding

- Ofcom needs to be able to engage with external organisations in an informal manner, to discuss matters at a high level inside and outside the scope of regulatory action. This type of engagement allows Ofcom to build relationships with all types of stakeholders. The threat of disclosure of information from these types of engagement would likely discourage the building of such relationships and would therefore have an adverse effect on Ofcom’s ability to effectively carry out its functions.
- Releasing such information to the public about these discussions, would not only inhibit the free and frank exchange of views internally and externally, but would also likely inhibit Ofcom’s ability to work in a collaborative way in the future with external organisations and regulators.

Reasons why the public interest favours withholding information

- Ofcom, as the communications regulator and forthcoming Online Safety regulator, needs to freely engage with external organisations and regulators where appropriate, to share views and expertise on matters relating to the development of relevant policy or legislation. We consider that on balance the importance of transparency on these matters is outweighed in this case by the need for Ofcom and external organisations and regulators to effectively engage on matters in relation to sectors which Ofcom regulates, and therefore disclosure would be contrary to the public interest.
- Ofcom needs to have the ability to form relationships with external organisations and regulators, and to freely communicate the results of such engagements internally. Disclosure would likely result in Ofcom colleagues and external organisations and regulators with which they engage with being less open to sharing views and engaging in valuable, informal discussions.