

Reference: 01711908

Information Requests
information.requests@ofcom.org.uk

25 January 2024

Freedom of Information request: Right to know request

Thank you for your request for information concerning 'riskiest' online providers - online safety. This request was received on 27 November 2023 and we have considered it under the Freedom of Information Act 2000 (the "FOI Act"). We wrote to you on 15 December 2023 to say we needed more time to consider the public interest in withholding or disclosing the information you have requested – we have now concluded this consideration.

Your request

"please search for any internal reports/emails between relevant staff members projecting what companies may be judged as the "riskiest" - this could be discussed generally or mentioned in discussions about more specific services"

You then narrowed *"relevant staff members"* to *"Ofcom directors"*

Our response

We have recently published our Consultation on Protecting People from Illegal Harms Online. [Chapter 30](#) of this Consultation sets out our approach to the supervision of what we envisage will be a small subset of the services in scope of the Online Safety Act 2023. The document explains that the term 'supervision' describes a set of activities to manage Ofcom's relationships with services, to understand and mitigate future risks and secure improvements in Ofcom's focus areas. It also explains that we will focus our supervision on the highest reach or highest risk services – in other words, those services that are likely to have the greatest impact on users' safety. A supervisory relationship does not therefore constitute a view on compliance priorities, as all in-scope services will need to comply with the requirements of the regime. While the total number of services we will be supervising has not yet been finalised, this chapter includes some further detail on the factors we will consider in deciding which services to supervise (see in particular paragraphs 30.11-30.13).

With respect to your request, we have conducted a search into emails and reports that have been sent to Directors which involve or mention discussions projecting which companies may be 'judged as the riskiest'.

While we do hold further information that is in scope of your request, this information is being withheld as it is exempt from disclosure under sections 36(2), 42, 40 and 44 of the FOI Act – we set out these provisions below.

Much of the information in the scope of your request contains working-level documents or discussions including exchanges of views between Ofcom colleagues. Section 36(2)(b)(ii) and (c) of the FOI Act provides 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
- would otherwise prejudice, or would be likely 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, some of the documents contain information which relates to specific businesses.

We consider that disclosure of some of this information is exempt from disclosure under section 44(1) of the FOI Act. Section 44(1) of the FOI Act provides that information is exempt from disclosure if its disclosure is prohibited by or under any enactment. The enactment that prohibits the disclosure of this information is section 393(1) of the Communications Act 2003 (the Communications Act). Under this section, we are prohibited from disclosing information with respect to a particular business that has been obtained in the exercise of our regulatory functions, unless that business consents or one of the statutory gateways under section 393(2) of the Communications Act is met, neither of which apply here. Section 44 of the FOI Act is an absolute exemption and therefore is not subject to the public interest test.

We consider that some information falls under the exemption in section 42 of the FOI Act. This 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.

Some of the information captured by the request contains personal information. 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, among other things, its disclosure would contravene any of the data protection principles in the UK General Data Protection Regulation and the Data Protection Act 2018. This includes the principle that personal data must be processed fairly and lawfully. Section 40 is an absolute exemption under the FOI 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

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 inhibit the free and frank exchange of views for the purposes of deliberation and/or 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:

A black rectangular redaction box covering the signature of the author.

Date: 24/01/2024

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 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"> • Ofcom recognises that the Online Safety regulatory regime and its approach to regulation is a matter of interest to the wider public. Releasing such information could be said to increase transparency in our work and allow for discussion in a public forum. 	<ul style="list-style-type: none"> • Any internal projection regarding services which may be judged to be the 'riskiest', whether referencing specific services or on a more general basis is subject to change, both to reflect external factors but also to reflect further internal deliberation. The disclosure of these documents containing working level projections could have an effect of Ofcom's ability to effectively deliberate on and discuss such plans before they are finalised and prior to any potential engagement with relevant services, and thus prejudice the effective conduct of Ofcom's approach to the implementation of the new online safety regime. • Releasing this information, which may reference particular services Ofcom hopes to engage with through supervision, may impact Ofcom's future working relationship with such services and therefore prejudice Ofcom's role as online safety regulator, as well as Ofcom's role more generally as the communications regulator. • Information regarding Ofcom's intended approach to supervision and the factors Ofcom will consider when deciding which services to supervise has been published as

	part of the Consultation: Protecting people from illegal harms online.
Reasons why public interest favours withholding information	
<ul style="list-style-type: none"> • At this time, Ofcom is withholding the requested information. The public interest test has been applied on the basis of disclosing information which would reveal which services Ofcom hopes to engage with through supervision. We consider that the public interest in withholding outweighs the public interest in disclosure. • This is because the disclosure of this information is likely to prejudice the effective conduct of public affairs, as it would have an effect on Ofcom’s employees’ ability to freely effectively deliberate on and discuss such matters before they are finalised and where such projections may be subject to change. • Whilst there may be some weight attached to the public interest in disclosing to enable the public to understand how Ofcom is facilitating its role as online safety regulator, we consider that significant prejudice would be caused by such a disclosure. Of particular relevance is the information which Ofcom has made publicly available in relation to its intended approach to supervision. 	

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 that the request includes 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 work undertaken 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 policy develops 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 work would be much reduced because it would not be fully informed and this would be contrary to the public interest.	