

Rt Hon Jeremy Wright QC MP
Secretary of State for Digital, Culture Media and Sport
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Lord Burns GCB
Chairman

12 April 2019

Dear Jeremy

This week the Ofcom Board was briefed on the discussions between Ofcom and your officials on Ofcom's new duty under the Digital Economy Act of 2017 to disclose information to you twenty four hours before it is published. I understand that regulations are planned to be laid this year specifying the information that will be exempt, (and by implication the information that will be subject to pre-disclosure).

In complying with the new duty, we want to ensure that risks are minimised for Government and for the companies that we regulate. Ofcom publishes around 450 documents a year on telecoms, media, spectrum and postal matters; many are market sensitive and individual regulatory decision documents can run to thousands of pages. Ofcom's general policy is not to pre-release market sensitive documents at all to stakeholders, or only exceptionally after markets have closed. For stakeholders who are based overseas, this in effect means releasing documents to them just ahead of publication. By operating such tight procedures we have established a reputation for protecting companies' confidential information.

Ofcom colleagues are discussing with your officials the need for a Memorandum of Understanding (MoU) that will put in place within Government processes to ensure the protection of confidential information. I would like to underline the importance that the Board will place on the assurances that the MOU provides. We would expect an MOU to put in place arrangements similar to those that were in place for National Statistics, namely that market sensitive documents are provided after markets close, the information is only shared as necessary with a tightly drawn list of named officials, and procedures are in place to deal with any breaches. Of course, this arrangement has now ceased – National Statistics are no longer disclosed (except in exceptional circumstances), following a review by the National Statistician in 2017.

Given the inherent complexities, I am grateful for the positive engagement from your officials over the past months. As things stand the Board and I have a number of outstanding concerns about the way the duty is planned to be implemented which I hope can be addressed before the department finalises its approach and the Board are formally consulted.

First, we are extremely concerned about an idea that has emerged to pre-disclose documents containing enforcement decisions (typically fines) against companies that have acted unlawfully. This would have the effect of informing the Government before the companies are themselves told of the findings against them. We would like to stress that we do not inform companies until just before publication of our decision, unless there is a settlement that we are negotiating with them. Our practice is to inform companies at 6am ahead of publication at 7am.

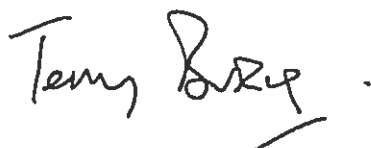
Second, we are equally concerned about the suggestion that pre-disclosure should be extended to decisions that are made in the exercise of our competition law functions. Were this approach taken, it would put Ofcom on a different footing from the Competition and Markets Authority (with whom we have concurrent competition powers), as well as the other concurrent sectoral competition authorities, such as Ofwat and Ofgem. In other words, telecoms companies would be treated differently from those in other sectors, which would be a cause of considerable confusion and could have unintended consequences in terms of the choice of decision taker between ourselves and the CMA. This runs against the move to achieve greater consistency amongst regulators.

Finally, an understanding had previously been reached with officials that all media publications should be exempt, in order to avoid the perception of political oversight of, or influence over Ofcom's regulatory decision-making. We are surprised that your officials are now proposing that major Ofcom media policy documents, including the five yearly Public Service Broadcasting Review, the Annual Report on the BBC and associated documents like the review into BBC news which includes its impartiality, would be included. In a context where Ofcom's independent role as the regulator of the BBC, and of the media more generally, is so important and under constant public scrutiny, we are concerned that pre-disclosing any media related publications risks undermining public confidence in the regime.

I am grateful for the recognition that companies whose information will be pre-disclosed should be given advance notification of the new procedures. This is information that affects the health and market standing of these companies. We are working on the basis that your officials will contact the companies at the point when a final proposal is submitted to the Ofcom Board for formal consultation. Alternatively, Ofcom would be happy to do so.

I have copied this letter to the Secretary of State for Business, Energy and Industrial Strategy, given arrangements will need to be fully aligned between the two departments in view of our responsibilities for postal regulation.

Yours sincerely

A handwritten signature in black ink, appearing to read "Terry Burns". The signature is written in a cursive, slightly slanted style. There is a small horizontal line under the name.

Terry Burns